IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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PRUDENTIAL LOCATIONS, LLC,
Respondent/Plaintiff-Appellant,

vs.

LORNA GAGNON and PRESTIGE REALTY
GROUP LIMITED LIABILITY COMPANY,
Petitioners/Defendants/Cross-Claim Defendants-Appellees,

and

RE/MAX LLC and LORRAINE CLAWSON,
Respondents/Defendants/Cross-Claimants/
Third-Party Plaintiffs-Appellees,

and

KEVIN TENGAN,
Respondent/Third-Party Defendant-Appellee.

SCWC-16-0000890 and SCWC-17-0000216

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000890 & CAAP-17-0000216; CIV. NO. 1CC131002328)

FEBRUARY 17, 2022

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART AND DISSENTING IN PART, IN WHICH NAKAYAMA, J., JOINS

I. INTRODUCTION

This case requires us to consider the enforceability of non-compete and non-solicitation agreements in the real estate profession. The clauses at issue restricted Lorna Gagnon from working for a new brokerage firm in Hawai'i for one year after terminating employment with Prudential Locations, LLC (Locations), and from soliciting persons "employed" or "affiliated with" Locations. The circuit court found both the non-compete and non-solicitation clauses to be invalid and granted partial summary judgment to Gagnon. The Intermediate Court of Appeals (ICA) vacated, ruling that both the non-compete and non-solicitation clauses were reasonable, valid, and enforceable.

I agree with the Majority that a restrictive covenant must, as a threshold matter, have a legitimate purpose other than stifling competition. See Hawai'i Revised Statutes (HRS) § 480-4(c).[1] I also agree that Locations introduced sufficient evidence to raise a question of material fact as to whether the non-solicitation clause had the legitimate purpose of

[1] HRS § 480-4(c) provides in relevant part:

> [I]t shall be lawful for a person to enter into any of the following restrictive covenants or agreements ancillary to a legitimate purpose not violative of this chapter, unless the effect thereof may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State . . . .

(Emphasis added).

maintaining the stability of Locations' workforce, and whether Gagnon initiated contact in soliciting one of Locations' employees.

However, I would further hold that Locations introduced sufficient evidence to raise questions of material fact as to whether the non-compete clause had the legitimate purpose of preventing the use of Locations' confidential information to unfairly compete. Unlike the Majority, I would therefore hold that Locations has made a showing sufficient to withstand summary judgment as to the non-compete clause.

Accordingly, I respectfully concur in part and dissent in part.

II. STANDARD OF REVIEW

"On appeal, an order of summary judgment is reviewed under the same standard applied by the trial courts. Summary judgment is appropriate where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to judgment as a matter of law." Reed v. City & Cnty. of Honolulu, 76 Hawai'i 219, 225, 873 P.2d 98, 104 (1994) (citing Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 258, 861 P.2d 1, 6 (1993)); see also Technicolor, Inc. v. Traeger, 57 Haw. 113, 113, 551 P.2d 163, 165 (1976). "[I]nferences to be drawn from the underlying facts alleged in the materials (such as depositions, answers to interrogatories, admissions and

affidavits) considered by the court in making its determination must be viewed in the light most favorable to the party opposing the motion." Traeger, 57 Haw. at 118, 551 P.2d at 168 (quoting Gum v. Nakamura, 57 Haw. 39, 42, 549 P.2d 471, 474 (1976)). "Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact, and therefore, insufficient to reverse a grant of summary judgment." Reed, 76 Hawai'i at 225, 873 P.2d at 104 (citing Briggs v. Hotel Corp. of the Pac., 73 Haw. 276, 281 n.5, 831 P.2d 1335, 1339 n.5 (1992)).

III. DISCUSSION

The Majority holds that summary judgment was properly granted in favor of Gagnon as to the non-compete clause because the record does not reflect a genuine issue of material fact as to whether Locations had a legitimate business interest. Respectfully, I disagree. I would hold that the circuit court erred in granting summary judgment because Locations introduced sufficient evidence to raise a question of material fact as to whether the non-compete clause had a legitimate purpose.

A. An Employer's Interest in Preventing Its Employee From Using the Employer's Confidential Information to Unfairly Compete is 'Legitimate' Under HRS § 480-4(c)

The first Hawai'i case to analyze the legitimate purpose requirement was 7's Enterprises, Inc. v. Del Rosario, 111 Hawai'i 484, 143 P.3d 23 (2006). There, we held that an

employee's access to confidential information is a factor "tending to show a protectable interest" under HRS § 480-4(c). See id. at 491, 143 P.3d at 30 (quoting Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 645 (Tenn. Ct. App. 1999)) (emphasis omitted).[2] We did not, however, hold that confidential information is a protectable interest standing alone. See id. at 493, 143 P.3d at 32 ("[T]raining that provides skills beyond those of a general nature is a legitimate interest which may be considered in weighing the reasonableness of a non-competition covenant, when combined with other factors weighing in favor of a protectable business interest such as trade secrets, confidential information, or special customer relationships.") (emphasis added).

I would expand upon the holding in 7's Enterprises to clarify that businesses have a legitimate interest under HRS § 480-4(c) in protecting against their employees' use of

[2] Other jurisdictions have similarly treated the protection of non-trade-secret, confidential business information as a "legitimate business interest." See, e.g., Vantage, 17 S.W.3d at 645; FLA. STAT. ANN. § 542.335(b) (West 2021) (listing "[v]aluable confidential business or professional information that otherwise does not qualify as trade secrets" as one of five legitimate business interests); Reed, Roberts Assocs. v. Strauman, 353 N.E.2d 590, 593-94 (N.Y. 1976) (holding that restrictive covenants are enforceable "to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information"); Gill v. Guy Chipman Co., 681 S.W.2d 264, 269 (Tex. App. 1984) ("[O]nce it is determined that confidential business information has in fact been imparted to an employee, restrictive covenants have been upheld as a valid means of protecting the employer's business."); Torbett v. Wheeling Dollar Sav. & Tr. Co., 314 S.E.2d 166, 169 (W. Va. 1983) (holding that "confidential information unique to an employer, customer lists generated by it, [and] trade secrets" are protectable interests).

confidential information to unfairly compete. See Vantage, 17 S.W.3d at 644; Gaver v. Schneider's O.K. Tire Co., 856 N.W.2d 121, 130 (Neb. 2014) (holding that employers have "a legitimate business interest in protection against a former employee's competition by improper and unfair means, but . . . not . . . against ordinary competition"). Specifically, I would hold that a legitimate protectible interest may be found where an employee acquires knowledge that is "sufficiently special as to make a competing use of it by the employee unfair." 7's Enterprises, 111 Hawai'i at 491, 143 P.3d at 30. Competition is unfair if a departing employee "would gain an unfair advantage in future competition with the employer." Vantage, 17 S.W.3d at 644; see also Gaver, 856 N.W.2d at 130-31.

This framing of the threshold test accords with our previous stance that confidential information is a factor "tending to show a protectable interest" under HRS § 480-4(c), 7's Enterprises, 111 Hawai'i at 491, 143 P.3d at 30 (emphasis omitted). It also reflects the "general recognition" that employers may use non-competes to protect themselves from "unfair competition" but not "ordinary competition." 54A Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 888. As to the ultimate question determining the

enforceability of a restrictive covenant — whether the agreement in question is "reasonable" — the Traeger test should apply.[3]

B. Locations Introduced Sufficient Evidence to Raise a Question of Material Fact as to Whether the Non-Compete Agreement Was Intended to Protect Locations' Confidential Information

The circuit court and the Majority incorrectly relied on one or more of the following reasons for concluding that Locations' asserted purpose was pretextual.

First, the circuit court pointed to deposition testimony by Locations' vice president of operations Dan Tabori, and statements by Locations' counsel at oral argument, to suggest that Locations' "sole interest" in enforcing the non-compete was to stifle competition. The Majority similarly relies on Tabori's deposition testimony to conclude that "a purpose" of Locations' non-compete was to prevent competition from new firms. Respectfully, I disagree that Tabori's testimony establishes Locations' intent to stifle competition

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[3] A restrictive covenant with a legitimate purpose is valid only if it is also reasonable under Technicolor, Inc. v. Traeger, 57 Haw. 113, 551 P.2d 163 (1976). Traeger held that courts generally will find such an agreement to be unreasonable if:

> (i) it is greater than required for the protection of the person for whose benefit it is imposed; (ii) it imposes undue hardship on the person restricted; or (iii) its benefit to the covenantee is outweighed by injury to the public. . . .

Id. at 122, 551 P.2d at 170 (quoting Harvey J. Goldschmid, Antitrust's Neglected Stepchild: A Proposal for Dealing With Restrictive Covenants Under Federal Law, 73 COLUM. L. REV. 1193, 1196 (1973)).

Whether the non-compete and non-solicitation clauses were reasonable need not be addressed here.

through its non-compete. When read in context, Tabori's testimony emphasized that the non-compete was aimed at preventing unfair competition using Locations' confidential information.

In the portion of his deposition cited by the Majority, Tabori suggested that Locations was concerned about Gagnon starting a competing firm with Locations' "stuff":[4]

> Q You said that the rationale for having a noncompete that prevents someone from forming a new entity such as Ms. Gagnon's restrictive covenant is that you don't want someone to start up a new competing enterprise against you, essentially with your stuff. Fair?
>
> A That would be the reason to put that language into the noncompete that Lorna Gagnon signed, fair.

(Emphasis added).

Unlike the circuit court and Majority, I find that Tabori neither "admit[ted]" nor "stated" that Locations' purpose was to prevent competition per se. Instead, I conclude that Tabori acknowledged Locations' intent to prevent its employee from using its "stuff" to gain an unfair advantage in future competition.[5]

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[4] Based on Tabori's testimony earlier in the deposition, the word "stuff" appears to refer to "confidential, proprietary information and procedures, and/or trade secrets," that Locations sought to protect through its non-compete. Tabori's testimony suggests that these materials included "CRM, website functionality, . . . CAR[] modules on sales training and related documents, individual performance data of agents, policy manuals, market research reports, and internal financial data."

[5] Similarly, the circuit court was incorrect to rely on statements by Locations' counsel in granting summary judgment. When read in context, the statements suggest that the purpose of Locations' non-compete was not to

(continued . . .)

Second, the circuit court concluded that because Gagnon's employment agreement had both a confidentiality provision[6] and a non-compete provision that did not explicitly refer to confidential information,[7] the two were mutually exclusive. I would hold that the circuit court erred in this respect. As other jurisdictions have recognized, the fact that an agreement has two such provisions does not necessarily mean that the non-compete is a pretext for stifling competition.

(. . . continued)

prevent ordinary competition, but to prevent unfair competition based on Gagnon's acquisition of confidential information. For example, at the August 3, 2016 hearing on the parties' motions for summary judgment, Locations' counsel identified Locations' interest in "protecting . . . its proprietary systems, its customer management, the training modules it's developed over 40 years, the information that was provided on a system-wide basis, including managerial reports to Ms. Gagnon about how to optimize the success of its sales force," as well as Gagnon's "access to confidential materials, proprietary materials that were the secret sauce, if you will, of why Locations is one of, if not the most, successful local real estate companies in Hawaii."

Later, Locations' counsel repeated that Locations was concerned about Gagnon using this information to unfairly compete:

> THE COURT: So one of the protectable interests of the non-compete clause on the second page is to avoid competition by a specific new company; correct?
> [LOCATIONS]: Yes, yes, with employees that have proprietary, confidential, unique information to our business. It prevents them from unfairly competing with us -- unfairly competing, not going and earning a livelihood, not competing by working for a competitor, but unfairly competing.

(Emphasis added).

[6] In its Findings of Fact, the circuit court noted: "Wholly contained in Paragraphs 2 and 2.1 of the Contract is a clause which restricts Ms. Gagnon's ability to use Location's confidential and proprietary information ('Confidentiality Clause')."

[7] The circuit court also noted, "Wholly contained in Paragraph 3 of the Contract is a clause which prevents Ms. Gagnon from competing with Locations ("Noncompete Clause"). . . . Paragraph 3 of the Contract does not use the term 'confidential.'"

See, e.g., Procter & Gamble Co. v. Stoneham, 747 N.E.2d 268, 277, 279 (Ohio Ct. App. 2000) (finding a non-compete valid and enforceable because it had the purpose of preventing employee's unfair use of employer's confidential information and trade secrets, despite existence of a separate confidentiality agreement). Put another way, a non-compete can legitimately seek to preclude a narrow category of competition — that which is based upon the use of the employer's confidential information.

Third, the Majority concludes that the fact that the non-compete only prohibited Gagnon from starting her own brokerage firm, while allowing her to work for an established firm, supported that the agreement was pretextual. But in Traeger, we held that the reasonableness of a non-compete is a question of law to be evaluated, in part, by considering the employee's ability to make a living in their chosen occupation. 57 Haw. at 119, 122, 551 P.2d at 168, 170. I disagree with the Majority's holding because it contradicts our decision in Traeger that non-competes should be reasonably limited. This would effectively penalize employers (like Locations) that have tried to stay within the bounds of the reasonableness standard established in Traeger. Id.

Fourth, both the circuit court and the Majority suggest Locations admitted that Gagnon had not improperly used

its trade secrets. As a threshold matter, it is not necessary for an employer to show that specific confidential information has been utilized by the former employee. See Stoneham, 747 N.E.2d at 279 (finding, under the "inevitable-disclosure rule," that threat of harm "can be shown by facts establishing that an employee with detailed and comprehensive knowledge of an employer's trade secrets and confidential information has begun employment with a competitor . . . in a [substantially similar] position"). Rather, it can be sufficient for the employer to show that the employee had access to confidential information which would be "substantially likely" to give the employee's new enterprise an unfair advantage. Id. at 280.

In this case, Locations and Gagnon vigorously disputed whether Gagnon had access to confidential information that could unfairly benefit her new business. For its part, Locations adduced evidence that Gagnon had access not only to proprietary data on the sales activities and email communications of Locations' agents, but also to data on customers' engagement with company tools, such as the properties they were viewing, their search criteria, and their frequencies of search. Locations further established that as a sales "coach," Gagnon had full access to data on not only the agents she coached, but on all of the agents registered in Locations' database. The record indicated that at least some of this data was not

available to the public.[8] Locations also established that its in-house research department generated reports that aggregated raw data into more digestible formats for coaches and senior managers.[9] These reports relied partially on publicly available information, and partially on internally sourced data. The reports were accessible to "anybody above a sales coach position," a category that included Gagnon but excluded non-coach agents and managers.[10]

In response, Gagnon argued that some of the purported confidential information was in fact available outside of the company and that Locations' inconsistency in protecting it (some similarly situated employees did not have non-competes, while others had non-competes with much different terms) showed that Locations was not serious about protecting its information. Those are potentially meritorious arguments, which should be weighed by the trier of fact against the evidence presented by Gagnon.

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[8] Unlike the Client Relationship Management (CRM) data that originated in public records like the Bureau of Conveyances and Hawaiʻi Information Services, the data on Locations' agents and clients came from Locations' proprietary website.

[9] This included "the Oahu market share report, which aggregates for a rolling twelve[-month] period, agent performance across [Oahu] . . . rank[ng] agents . . . based on productivity, mix of business, buy versus sell transactions, et cetera."

[10] Managers had more access than agents. Sales coaches were a subset of managers.

I express no opinion on whether Locations will prove on the merits that Gagnon's access to confidential information would have enabled her to unfairly compete. I nevertheless find that Locations made a showing sufficient to withstand Gagnon's motion for summary judgment as to the non-compete. Locations' evidence that Gagnon had access to information not available to the public or lower-level employees, and its evidence that Locations did seek to protect such information in Gagnon's case, provide sufficient support for Locations' contention that it had a legitimate business interest. Therefore, I would find that the circuit court erred in granting Gagnon's motion for summary judgment as to the non-compete.

IV. CONCLUSION

Although I express no opinion on whether Locations will ultimately prevail on the merits, I believe that Locations has made a showing sufficient to withstand summary judgment as to both the non-compete and non-solicitation clauses. Accordingly, I respectfully concur in part and dissent in part. I would vacate the circuit court's grant of summary judgment to Gagnon with respect to both clauses, and remand for further proceedings.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama