

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of December, 2008.

KBH Corporation, Appellant,

against Record No. 080371
 Circuit Court No. CL07-1838

David R. McGeorge Car Company, Incorporated, Appellees.
t/a McGeorge Toyota, et al.,

Upon an appeal from a
judgment rendered by the Circuit
Court of Henrico County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no error in the judgment of the circuit court.

KBH Corporation ("KBH"), a retailer and wholesaler of only used automobiles, sought to enjoin Randy Anderson ("Anderson"), its former employee, from working for David P. McGeorge Car Company, Inc. ("McGeorge"), a dealer of both new and used cars. In support of its complaint, KBH relied upon a non-competition provision in its contract with Anderson, which stated in pertinent part:

Throughout any period during which Representative is an employee of the KBH, and for a period of one (1) year from and after the date upon which Representative shall cease for any reason whatsoever to be an employee of KBH, Representative covenants and agrees that he will not directly or indirectly for himself or for the benefit of another engage, directly or indirectly, either as proprietor, stockholder, partner, officer, employee or otherwise, in any business which purchases, sells, or distributes

automobiles or provides services substantially similar to those sold or provided by the KBH ("Services") within forty-five (45) mile radius of the KBH's Richmond, Virginia and Ashland, Virginia offices. However, for purposes of this paragraph, this restriction with respect to KBH's Services applies only to those services rendered by Representative or an office or unit of KBH over which Representative had supervisory authority.

The trial court sustained demurrers filed by McGeorge and Anderson because it held that the non-competition provision was overbroad and therefore unenforceable.

In its only assignment of error granted by this Court, KBH argues that this finding was erroneous, because the provision bars Anderson from performing for McGeorge "only [] those services rendered by [Anderson] or an office or unit of KBH over which [Anderson] had supervisory authority," along with a geographic limit of 45 miles and a time limit of one year. KBH asserts that this limitation is reasonable and lawful. In response, McGeorge and Anderson contend that the trial court correctly held that the provision was overbroad and unenforceable because the language of the provision bars Anderson from working for McGeorge in any of its activities, not merely in those that directly compete with KBH. We agree with McGeorge and Anderson.

The enforceability of a covenant not to compete is a question of law we review de novo. Omniplex World Services Corp. v. US Investigations Services, Inc., 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005). Furthermore,

[c]ovenants not to compete are restraints on trade and accordingly are not favored. The validity of a covenant not to compete is determined by applying not only the general principles of contract construction, but also legal principles specifically applicable to

such covenants. The employer bears the burden to show that the restraint is reasonable and no greater than necessary to protect the employer's legitimate business interests. The restraint may not be unduly harsh or oppressive in curtailing the employee's legitimate efforts to earn a livelihood and must be reasonable in light of sound public policy. As a restraint of trade, the covenant must be strictly construed and, if ambiguous, it must be construed in favor of the employee.

Motion Control Sys., Inc. v. East, 262 Va. 33, 37, 546 S.E.2d 424, 425-26 (2001) (citing Richardson v. Paxton Co., 203 Va. 790, 794-95, 127 S.E.2d 113, 117 (1962)).

Consistent with these principles, in previous cases we have narrowly construed "similar business" language in non-compete provisions. For example, in Motion Control Systems, Inc., we examined a covenant included in the employment contracts of a company that manufactured specialized brushless motors. 262 Va. at 35, 546 S.E.2d at 425. The covenant barred employees from going to work for competitors engaged in a "similar business," with "similar" defined as "any business that designs, manufactures, sells or distributes motors, motor drives or motor controls." Id. at 37-38, 546 S.E.2d at 426. The trial court in that case had determined that this language precluded a broader range of activities than was necessary to protect the employer's business interests, and we agreed, holding that the restricted activities "'could include a wide range of enterprises unrelated to'" the employer's business, and was therefore overbroad and unenforceable. Id. at 38, 546 S.E.2d at 426.

In this case, like the employer in Motion Control Systems, KBH was engaged in a particular subset of business: the wholesaling of used automobiles. The provision in Motion Control Systems covered

not only the employer's particular business but essentially the entire motor industry, including specific types of business in which the employer was not engaged. In the same manner, the provision at issue here sought to preclude Anderson from affiliating with "any business which purchases, sells, or distributes automobiles." Such a wide-ranging prohibition is manifestly unnecessary to protect employers' competitive advantage and, in light of the disfavored status of such restraints, cannot be enforced.

KBH makes one further argument, claiming that the last sentence of the paragraph at issue limits the covenant to only the duties Anderson actually performed for KBH, or that were performed under his supervision. It reads: "However, for purposes of this paragraph, this restriction with respect to KBH's Services applies only to those services rendered by Representative or an office or unit of KBH over which Representative had supervisory authority." KBH's contention is belied by the plain language of the covenant itself, read as a whole.

A correct reading of the contested language reveals that this limitation does not apply to the entire covenant. The disputed language forbids employees from working for a business that either "purchases, sells, or distributes automobiles" OR "provides services substantially similar to those sold or provided by the KBH ("Services")." The designation of "Services" as a defined term carries through the remainder of the paragraph and, therefore, the ban on performing services similar to "KBH's Services" for a competitor affects only the second clause of the disjunctive prohibition. This leaves the unlimited bar upon working for "any business which purchases, sells, or distributes automobiles," which, as discussed above, is impermissibly overbroad.

Taken as a whole, the non-compete provision in the contract was overbroad. Therefore, the circuit court did not err in sustaining McGeorge's and Anderson's demurrers. Accordingly, the judgment of the circuit court is affirmed.

This order shall be certified to the said circuit court.

A Copy,

Teste:

*original order signed by the
Clerk of the Supreme Court of
Virginia at the direction of the
Court*