REL: April 23, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190615

John Boyd and Batey & Sanders, Inc.

v.

Emily Hawk Mills, as personal representative of the Estate of Thomas Batey, deceased

Appeal from Etowah Circuit Court
(CV-17-900343)

MITCHELL, Justice.

This appeal requires us to address an issue of first impression before this Court: whether a noncompetition agreement executed ancillary to the

sale of a business terminates upon the death of the individual subject to the covenant not to compete. Because the noncompetition agreement in this case did not impose any affirmative obligations on the decedent and was executed separately from the other agreements relating to the sale of the business, we hold that the noncompetition agreement did not terminate.

Facts and Procedural History

In 2006, Thomas Batey sold all of his stock in Batey & Sanders, Inc., a provider of construction and highway-industry products that he solely owned, to its president, John Boyd, and to Batey & Sanders ("the buyers") through stock-purchase agreements ("the stock agreements"). The parties to the stock agreements simultaneously executed several other contracts, including a noncompetition agreement ("the noncompete") and an employment agreement. The stock agreements required the execution of the noncompete and the employment agreement as conditions to the buyers' obligations to close on the stock agreements.

The noncompete is the center of this dispute. It was executed "as further consideration for the purchase of [Batey's] shares" conveyed in the stock agreements, and it prohibited Batey from doing three things:

> "(i) [to] cause, induce or encourage any employees of [Batey] who are or become employees of [Batey & Sanders] or [Boyd] to leave such employment; (ii) [to] cause, induce or encourage any material actual or prospective customer, supplier, manufacturer or licensor of [Batey], or any other person who has a business relationship with [Batey] which is material to [Batey], to terminate or change any such actual or prospective relationship in a manner which would be adverse to [Boyd] or [Batey & Sanders]; or (iii) [to] conduct, participate or engage, directly or indirectly, in any business involving the operation of a business similar [to] that conducted by [Batey & Sanders]…."

Those were Batey's only obligations under the noncompete. In return, the buyers agreed to pay Batey $2,136,631.62 as the "total consideration" for the noncompete "in 120 equal monthly payments of $17,805.26 starting on December 1, 2006 and continuing on the first (1st) day of each month thereafter until paid in full."

Batey died in April 2013. The buyers allegedly continued making most of the monthly payments due under the noncompete until December 2013, but then they ceased making the monthly payments, three years shy

of the end of the term of the noncompete. The amount allegedly due for the remaining three years of the noncompete totaled $640,989.36.

Emily Hawk Mills, as personal representative of Batey's estate ("the estate"), sued the buyers in the Etowah Circuit Court, seeking the remaining amount allegedly due under the noncompete. After the parties filed cross-motions for summary judgment, the trial court entered summary judgment in the estate's favor. It found that "Batey's interest in the goodwill of Batey & Sanders, Inc. was consideration given in the initial sale of the business, and conclusively the Non-Competition Agreement was not a personal services contract that became voidable" by the buyers after Batey's death. The buyers appealed.

Standard of Review

Our review of a summary judgment is de novo. See Pittman v. United Toll Sys., LLC, 882 So. 2d 842, 844 (Ala. 2003). When we review a summary judgment, we use the same standard as the trial court -- that is, we determine whether the evidence before it created a genuine issue of material fact and, if not, whether the movant was entitled to judgment as a matter of law. Id.; see also Rule 56(c), Ala. R. Civ. P. Because the

issue before us does not hinge on any factual determination, we evaluate whether the trial court correctly determined that the estate was entitled to judgment as a matter of law.

Analysis

We have been asked to address one issue: whether the buyers' obligations under the noncompete survived Batey's death. When we are called upon to determine parties' contractual rights, this Court must first look to the plain language of the contract, and we "may not make a new contract for the parties or rewrite their contract under the guise of construing it." Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33, 35-36 (Ala. 1998).

The noncompete did not expressly address what would happen in the event of Batey's death. It merely provided that the buyers "shall" pay Batey $2,136,631.62 "in 120 equal monthly payments of $17,805.26 starting on December 1, 2006 and continuing on the first (1st) day of each month thereafter until paid in full." The buyers could pursue "an injunction, restraining order or other equitable relief," along with "any other rights and remedies which [the buyers] may have hereunder or at

law or in equity" if Batey breached the noncompete. Importantly, however, the noncompete did not require Batey to perform any act -- it only required him to refrain from performing certain acts. Further, the buyers did not have an express right to cancel the noncompete in the event of a breach by Batey, even though the noncompete gave Batey the "full power and authority to cancel [the noncompete] and exercise all remedies available to him as set forth in [the noncompete and stock agreements, among others,]" upon a default by the buyers. Thus, nothing in the language of the noncompete expressly allowed the buyers to cease payments under the agreement after Batey's death.

Because the noncompete did not give the buyers an express right to terminate, they argue that it was a "personal service contract" that did not survive Batey's death. This Court has held that "[c]ontracts resting on the skill, taste, or science of a party, i.e., those contracts wherein personal performance by the promisor is of the essence and the duty imposed can not be done as well by others as by the promisor himself, are personal and do not survive his death." Cates v. Cates, 268 Ala. 6, 10, 104 So. 2d 756, 759 (1958). But "[a] contract that is not one for personal

services survives the death of the decedent," and the decedent's personal representative has the right to enforce the contract. McGallagher v. Estate of DeGeer, 934 So. 2d 391, 403 (Ala. Civ. App. 2005). This Court has not addressed whether a noncompetition agreement is a personal-service contract that terminates upon the death of the party subject to the covenant not to compete.[1]

The buyers rely primarily on Slone v. Aerospace Design & Fabrication, Inc., 111 Ohio App. 3d 725, 676 N.E.2d 1263 (1996), in which the Ohio Court of Appeals considered two cases in which a party to a covenant not to compete died before the payments securing that covenant were completed. The court recognized that, in the context of noncompetition agreements executed in conjunction with the sale of a business, "[t]he majority rule is that noncompetition agreements which

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[1]This Court has, at least in one case that none of the parties cite, stated that it will "not specifically enforce, as of course, the naked terms of a negative covenant in a personal service contract restricting other employment ...." Robinson v. Computer Servicenters, Inc., 346 So. 2d 940, 943 (Ala. 1977). But that reference was in passing -- Robinson did not directly address whether a noncompetition agreement constitutes a personal-service contract, let alone whether it terminates upon a party's death.

are not part of larger agreements such as employment contracts containing affirmative promises of personal services are not personal service contracts." 111 Ohio App. 3d at 731, 676 N.E.2d at 1267. But, the court stated, when they "are joined with affirmative promises, the covenant not to compete is a personal service contract which terminates upon the death of the covenantor." 111 Ohio App. 3d at 731-32, 676 N.E.2d at 1267 (emphasis omitted). In part because the noncompetition agreements before it did not fit within the majority rule for noncompetition agreements "ancillary to the sale of a business," 111 Ohio App. 3d at 731, 676 N.E.2d at 1267, the Ohio Court of Appeals held that they were personal-service contracts. The noncompete here, however, was ancillary to the sale of a business and was not "part of [a] larger agreement[] such as [an] employment contract[] containing affirmative promises of personal services." Id. Thus, Slone does not apply.

The buyers also mistakenly rely on Bloom v. K & K Pipe & Supply Co., 390 So. 2d 770 (Fla. Dist. Ct. App. 1980). In that case, Joseph Bloom entered into a noncompetition agreement with the company that purchased his business, but he died before that agreement expired. Id. at

771. In addition to prohibiting Bloom's competition with the company, the agreement also required him to "answer any questions and respond to any request for information from [the company] which relate to the business of [the company]." Id. at 771. Based in part on that language, the Florida District Court of Appeals held that the noncompetition agreement terminated upon Bloom's death because the personal representative of his estate could not "perform as fully and as well as [Bloom] might have." Id. at 773. But, unlike in Bloom, the noncompete here imposed no affirmative obligations on Batey -- only negative covenants in which he agreed not to do certain things. Thus, there is nothing for the personal representative of the estate to "perform" in the first place.

The estate, on the other hand, argues that Mail & Media, Inc. v. Rotenberry, 213 Ga. App. 826, 446 S.E.2d 517 (1994), is on point. In that case, Mr. Rotenberry sold a corporation he solely owned and signed separate noncompetition and employment agreements. The purchaser continued making payments under the noncompetition agreement until Rotenberry died, at which point it argued that the noncompetition agreement was a personal-service contract that terminated upon his

death. The Georgia Court of Appeals disagreed. It held that, "while a noncompetition agreement joined with affirmative promises is a personal services contract which terminates upon the death of the promisor, a noncompetition agreement standing alone, with no affirmative promises, is not." 213 Ga. App. at 827, 446 S.E.2d at 519. More specifically, it reasoned that, "[w]hen a noncompetition agreement ancillary to the sale of a business does not also require the seller to affirmatively provide services to the buyer, the essential benefit the buyer is purchasing is the business's goodwill (as opposed to the seller's expertise)," so "the seller's death does not deprive the buyer of this benefit ...." Id.[2]

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[2]The Georgia Court of Appeals' decision in Rotenberry does not stand alone. See, e.g., Sanfillippo v. Oehler, 869 S.W.2d 159, 163 (Mo. Ct. App. 1993) (holding that covenant not to compete in "Employment and Non-Competition Agreement" was severable from employment portion of the agreement and was "not one for personal services and accordingly, defendant's payment obligation did not terminate" on the covenantor's death); TPS Freight Distribs., Inc. v. Texas Commerce Bank-Dallas, 788 S.W.2d 456, 458-59 (Tex. App. 1990) (holding that covenant not to compete ancillary to an asset-purchase agreement, which contained no affirmative promises, was not a personal-service contract and survived death of covenantor); Rudd v. Parks, 588 P.2d 709, 712-13 (Utah 1978) (holding that payments due under covenant not to compete ancillary to sale of business did not terminate upon covenantor's death); see also Symphony Diagnostic Servs. No. 1 Inc. v. Greenbaum, 828 F.3d 643, 647 (8th Cir.

The reasoning of Rotenberry is persuasive. As in that case, Batey signed the noncompete -- which was separate from the employment agreement, had separate consideration, and contained only negative covenants -- ancillary to the sale of Batey's stock in Batey & Sanders and as required by the stock agreements. In addition, the parties entered the noncompete as "further consideration for the purchase of [Batey's] shares" conveyed in the stock agreements. Under these facts, "the essential benefit" of the noncompete was a purchase of "the business's goodwill (as opposed to the seller's expertise)," so Batey's death "does not deprive the

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2016) (observing that "the crucial difference between a personal services contract and a non-compete agreement" is that "the former requires affirmative actions by the employee, whereas the latter requires only that they refrain from certain actions" (emphasis omitted)); Managed Health Care Assocs., Inc. v. Kethan, 209 F.3d 923, 929 (6th Cir. 2000) (noting that a personal-service contract "requires that one of the parties be bound to render personal services" but that "a noncompetition clause only requires that one of the parties abstain from certain activities"). The court in Keller v. California Liquid Gas Corp., 363 F. Supp. 123 (D. Wyo. 1973), reached the opposite conclusion. But the buyers do not rely on Keller, and, as the Georgia Court of Appeals noted, Keller appears to be an outlier. Regardless, because Keller "failed to distinguish between those noncompetition agreements which are made in the context of an employment agreement and those which are not," its "reasoning is flawed." Rotenberry, 213 Ga. App. at 827 n.1, 446 S.E.2d at 519 n.1.

[buyers] of this benefit." Rotenberry, 213 Ga. App. at 827, 446 S.E.2d at 519. Thus, the noncompete was not a personal-service contract in which "personal performance by the promisor is of the essence." Cates, 268 Ala. at 10, 104 So. 2d at 759. And because it is not a personal-service contract, the noncompete "survives the death of the decedent" and the personal representative of the estate has the right to enforce the noncompete. McGallagher, 934 So. 2d at 403.

The buyers' remaining arguments are unavailing. First, they argue that the lack of an inurement clause in the noncompete -- that is, a clause stating that the benefits and obligations of a contract pass to a decedent's heirs -- indicates that the parties intended to terminate the noncompete upon Batey's death. They say that omission is especially notable because the stock agreements and a stock-pledge agreement do contain inurement clauses. But the mere absence of an inurement clause does not override the other principles discussed above. Second, the buyers argue that requiring their continued payment under the noncompete "would fundamentally alter the business landscape of this great and business friendly state" because, they say, it "would render such common

agreements so risky and such a potential liability that they might as well be useless." Buyers' brief at 8. The buyers, as self-acknowledged sophisticated parties, are likely aware of an obvious and simple solution: provide in the contract whether the noncompetition agreement will survive the death of the party who promises not to compete. See TPS Freight Distribs., Inc. v. Texas Commerce Bank-Dallas, 788 S.W.2d 456, 459 (Tex. App. 1990) ("If appellants had wished to reserve the right to pay less than the full sum, in the event of Blair's death, they could have inserted such a condition into the contract. They did not.").

Conclusion

The language of the noncompete did not give the buyers the right to cease payments because of Batey's death. Nor is the noncompete a personal-service contract that terminated upon Batey's death. For those reasons, the trial court properly entered summary judgment in favor of the estate.

AFFIRMED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur.