1983

Randall C. Labrum v. v. Durrell Chivers : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

RANDALL C. LABRUM, Plaintiff & Respondent, -vs- V. DURRELL CHIVERS, Defendant & Appellant.	NO. 19296

APPELLANT'S BRIEF

Appeal from a Judgment of the Seventh District Court, HON. DAVID SAM, Judge.

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TABLE OF CONTENTS

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Plaintiff & Respondent,

-vs-

V. DURRELL CHIVERS,

Defendant & Appellant.

No. 19296

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

IN THIS ACTION Plaintiff brought suit against Defendant to enjoin Defendant from Practicing Chiropractry and also praying for damages because of Defendant's breach of a non-competition covenant in a contract.

DISPOSITION IN LOWER COURT

THIS ACTION was heard without a jury before David Sam, District Judge, and upon the evidence submitted the Court ruled that the Non-competition clause of the contract was breached and enforceable against the Defendant and gave a final judgment therefor, as to the amount of damages, the matter was referred to the Seventh District Court for further determination of the same. From the Judgment ruling the Non-Competition portion of the contract is

valid and enforceable and the damage aspect of the judgment was referred to the Seventh District Court for further determination. From this Judgment Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the Judgment holding that the Non-Competition clause of the Contract is valid and enforceable.

STATEMENT OF THE FACTS

Plaintiff brought the action on a Contract entered into between Plaintiff and Defendant for the purchase of Defendant's Chiropractic Office. The consideration for the purchase was a payment of a cash price and the inclusion in the contract of a provision that Defendant would not engage in the practice of Chiropractery in Uintah County or operate a Chropractic office in Uintah County for ten years. Subsequently Plaintiff sold his Chiropractic business and Defendant returned to Vernal and opened a Chiropractic office and practice. Plaintiff iniated this action praying for damages and seeking to enjoin Defendant from engaging in the practice of chiropractery in Uintah County. The Court entered Judgment holding that the "non-competition" clause of the Contract was breached and that the same is enforeceable. From this Judgment, Defendant appeals.

ARGUMENT

POINT # 1: The Judgment of the Court ruling that the covenant is a final Judgment and the matter is appeable to as to fact and law.

The Judgment of the Court holding that the non-competition covenant was breached and enforceable against defendant, leaving

the matter of damages to be further determined is a final judgment and is separable to the question of damages. The fact that it can be enforced against the Defendant immediately puts it in the categor of a final judgment. Winnovich v Emery, 33 U. 345; Bristol v Brent, 35 U. 213.

POINT # 2: The Court failed to consider and weigh the facts and balance the equities both as to consequences to fact and law as such pertains to the enforcement of the non-competition clause of the agreement.

The cases and precedents with respect to non-competition covenants will in certain instances be upheld, they are subject to certain limitations. In a landmark case on this issue, the U.S. Supreme Court observed that " .. an anti-competition covenant ancillary to the sale of a business is reasonable so as to be enforceable, only if it is necessary to secure the buyer the benefits of the business and good will which he purchased." Shawnee v Anderson, 209 U. S. 432. And as a absolute corellary to any consideration as to whether the Defendant should be enjoined from opening a chiropractric office or engage in the practice of Chiropractery, is the reasonableness of the restraint; and pertinent issues with regard to this question relates to the territorial extent of the restraint; the nature of the business practice involved ; noting these considerations the fact to be considered, and apparently disregarded by the Court is the precise nature of the restraint, surely it is a matter of judicial notice that the business area of Uintah County because of population growth is considerably different than it was at the time Defendant's business was sold in 1978. Shute v Shute, 176 N.C. 462. And the reasonableness of the restraint is different for different sorts of business. Surely the present situation does not involve a retail establishmen

which was the subject of a law suit subsequently. In view of the serious implications suggested in Defendant's affidavit, its effect upon the enforcement of the restrictive covenant with respect to an agreement not to compete should have required the granting of a new trial. Paul v. Berkendall, 123 U. 627; also Utah State Constitution, Art. VIII, Sec. 9.

CONCLUSION

In considering whether it would enforce the covenant not to compete in the agreement which is the subject of this litigation the Court completely ignored matters of reasonableness public policy and other facts that ought to have been considered. Pertinent in this respect it ignored the very extent of the agreement made sometime in 1978 to extend for a whole period of ten years and to encompass the whole area of Uintah County, surely when these facts are viewed in the light of the phenomenal growth of population of the area, the further demand of services, it would impose a severe hardship on Defendant and on the citizens at large to impose this covenant.

Similarly, evidence also shows that Defendant had largely recovered the initial consideration given for the sale, that he was no longer engaged in the practice of chiropractery in the area, and in view of these matters, imposition of the covenant served merely to limit competition in the area, to restrict Defendant's ability to practice, deny the public of these services at a time when they were needed and when the Plaintiff was unable to render them

Likewise serious consideration should also be given to the fact that granting the right to enforce the agreement imposes upon public policy in at least two respects: (1) it by agreement restricts

the number of chiropracters that can practice in the area indirectly without a showing that the same was a part of the increments and good will which Plaintiff purchase: and (2) it does in a manner intrude upon the policy of the State in licensing the practice of chiropractery and subject to its regulations to allow the practice of those licensed for such practice anywhere in the state in that it allows parties by private agreement to restrict the benefit of that practice and to exclude a practitioner therefrom .

And finally, the matters set forth in Defendant's Affidavit in support of his motion for a new trial brought forth allegations that would completely cut the ground under the grounds for which Plaintiff sought relief in his original suit. In the light of these allegations and the matters(as set forth in the affidavit) that Plaintiff had signed a similar non-competition agreement when he disposed of the business, this fact which was at unknown and undiscoverable at the time of the trial should have merited a new trial on the issues, at it was an abuse of discretion, in the face of these facts, to deny Defendant's Motion.

Respectfully Submitted this 29th day of July, 1983

ALVIN C. NASH, Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed two (2) copies of the foregoing brief on this 29th day of July, 1983 as follows:

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