Daniel Faber
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Laster v. Land

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**STEPHEN LASTER and
S. LASTER, INC., d/b/a/
NOVUS WINDSHIELD REPAIR,**

Plaintiffs-Appellants,

vs. **No. 20,502**

JOHN R. LAND,

Defendant-Appellee.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Theresa C. Baca, District Judge**

Patrick McDaniel
Mickey D. Barnett
Barnett Law Firm, P.A.
Albuquerque, New Mexico Attorneys for Plaintiffs-Appellants

Daniel M. Faber
Albuquerque, New Mexico Attorney for Defendant-Appellee

MEMORANDUM OPINION

CASTILLO, Judge.

Plaintiffs appeal from a final judgment after a bench trial wherein the trial court denied Plaintiffs' claims related to an alleged breach of an employment contract with a covenant not to compete. We affirm.

BACKGROUND

In 1993, Stephen Laster and S. Laster, Inc. (Employer) purchased an Albuquerque business, Novus Windshield Repair (Novus). John Land (Employee) worked at Novus at the time of the sale, and stayed on with the new Employer as a repair technician. Employer asserts that Novus technicians use a proprietary process to fix cracked windshields. In 1994, Employer required Employee to sign an employment agreement containing the formula for compensation and a covenant not to compete. The agreement contained no term of employment and the parties appear to agree that Land was an at-will Employee. In March 1995, Employer unilaterally modified the compensation formula. Then, in March 1997, Employer terminated Employee. Within a month of termination, Employee began work as a windshield repair technician with another business in the Albuquerque area contrary to the terms of the covenant not to compete. On April 20, 1998,

Plaintiffs Stephen Laster and S. Laster, Inc., d/b/a/ Novus Windshield Repair filed a complaint against Employee seeking liquidated damages and injunctive relief based on the alleged breach of the employment agreement, specifically the covenant not to compete. After a bench trial, the court entered judgment denying all of Plaintiffs' claims.

DISCUSSION

Employer argues that the judgment below should be reversed for two reasons: (1) the covenant not to compete was enforceable as a matter of law, and (2) the unilateral modification of the compensation formula by Employer did not invalidate the contract of employment containing the covenant not to compete. We do not reach the merits of either contention, however, because Employer failed to preserve these arguments for appellate review.

In New Mexico, there are cases regarding non-compete clauses contained in employment contracts and as part of the sale of a business. *Bowen v. Carlsbad Ins. & Real Estate, Inc.*, 104 N.M. 514, 516, 724 P.2d 223, 225 (1986) (sale of business); *Taylor v. Lovelace Clinic*, 78 N.M. 460, 462-63, 432 P.2d 816, 818-19 (1967) (employment contract); *Lovelace Clinic v. Murphy*, 76 N.M. 645, 649-51, 417 P.2d 450, 453-54 (1966) (employment contract). In both cases, the terms of the covenant must be reasonable in order to be enforceable. *Bowen*, 104 N.M. at 516, 724 P.2d at 225; *Murphy*, 76 N.M. at 649, 417 P.2d at 453. In determining reasonableness, courts consider such factors as the nature of the business, its location, the parties involved, the purchase price, and the main object of the restriction. *Bowen*, 104 N.M. at 516, 724 P.2d at 225. Employer's argument is that the contract should be held enforceable as a matter of law.

The questions Employer raises go to the reasonableness of the contract and its breach; such questions subsume questions of fact. After the presentation of all the evidence, the trial court requested that each party tender findings of fact and conclusions of law. Only Employee complied with the trial court's request. Despite Employer's failure to tender findings of fact and conclusions of law to the trial court, Employer now asks this Court to make findings that would uphold a different result. This we cannot do. Appellate courts are not fact finding bodies; it is the province of the district court to determine the facts of a case. *Cockrell v. Cockrell*, 117 N.M. 321, 323, 871 P.2d 977, 979 (1994). "Further, a party cannot claim on appeal that the trial court erred by failing to make specific findings of fact and conclusions of law if the aggrieved party has . . . failed to tender specific findings and conclusions." *Cockrell*, 117 N.M. at 323, 871 P.2d at 979; *see* Rule 1-052(B)(1)(f) NMRA 2001. Therefore, a party cannot "obtain a review of the evidence where he failed to make requested findings or file exceptions." *Cockrell*, 117 N.M. at 324, 871 P.2d at 980. Because Employer's arguments include questions of fact, and because Employer failed to submit requested findings and conclusions, Employer has no standing to question the factual predicate of the trial court's final judgment. Under these circumstances, "no question is presented to this court of which it can take cognizance." *Cockrell*, 117 N.M. at 323, 871 P.2d at 979 (quoting *Blacklock v. Fox*, 25 N.M. 391, 393-94, 183 P. 402, 404-05 (1919)). Nor did Employer call the trial court's attention to alleged error in any other way. Employer continually argued the case as though it involved questions solely of law although Employee pointed out that reasonableness was at issue an argued facts concerning that issue.

Additionally, Employer relies on statements the trial court made after the summary judgment motion and at the end of the trial in arguing for a reversal of the judgment below. These oral communications made by the trial court were not part of a written decision or judgment of the court. Such comments are extraneous to a court's judgment or decision and error may not be predicated thereon. *Getz v. Equitable Life Assurance Soc'y of the U.S.*, 90 N.M. 195, 197-98, 561 P.2d 468, 470-71 (1977); *Fox v. Doak*, 78 N.M. 743, 745, 438 P.2d 153, 155 (1968).

For the foregoing reasons, we affirm the judgment.

IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

RICHARD C. BOSSON, Chief Judge

LYNN PICKARD, Judge

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