In The

Supreme Court of Virginia

RECORD NO. 121989

ASSURANCE DATA, INC.,

Appellant,

v.

JOHN MALYEVAC,

Appellee.

REPLY BRIEF OF APPELLANT

C. Dean Latsios (VSB No. 17350)
MATTHEWS, SNIDER & FITZNER, P.C.
4161 Chain Bridge Road
Fairfax, Virginia 22030
(703) 273-1131 (Telephone)
(703) 273-1167 (Facsimile)
cdeanlatsios@msnflaw.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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ARGUMENT

I. THE COURT ERRED IN SUSTAINING, *ON THE MERITS*, THE DEFENDANT'S OBJECTION TO THE ENFORCEABLILITY OF THE NON COMPETITION AND NON SOLICITATION PARAGRAPHS OF THE PARTIES AGREEMENT, RAISED THROUGH A DEMURRER, AND DISMISSING THE COMPLAINT WITH PREJUDICE.

Argument:

A.

The defendant's assertion that this court cannot evaluate the erroneous action of the circuit court, set out in the above assignment of error, because the plaintiff did not proffer to the circuit court what evidence it would have offered to support the validity of those paragraphs is meritless. Brief for Appellee at 5-6. Dade v. Anderson, 247 Va. 3, 439 S.E.2d 353 (1994), cited by the defendant as support for this proposition, is inapposite and devoid of such support.

Dade concerned, *inter-alia*, the denial by the trial court of the plaintiff's request for leave to file a second amended motion for declaratory judgment, which denial is reviewed by this court under an abuse of discretion standard. This court stated that the plaintiff's failure to tender to the trial court a second amended motion for declaratory judgment or proffer to the court what would have been alleged had leave to amend been granted, precluded this court from

determining whether the trial court abused its discretion in denying the plaintiff's requested leave to amend. Id. at 8, 356.

Dade did not deal with the question of law, presented in the above assignment of error, concerning the propriety of the circuit court's action, taken within the context of consideration of a demurrer, and this court's ability to conduct its *de novo* review of same. The issue in the instant case is completely different to the issue in Dade and is subject to a completely different standard of review by this court.

The defendant's bald statement that additional facts, beyond those set out within the plaintiff's complaint, needed to be proffered to the circuit court for its consideration in order for this court to be able to consider the above assignment of error, is without any support in law and is an attempt by the defendant to invent its own law out of whole cloth. On a demurrer, "[T]he trial court, and this Court upon review, are confined to the facts alleged when analyzing the pleading; no consideration properly can be given to additional facts that may be asserted on brief or during oral argument." Elliott v. Shore Stop, Inc., et al, 238 Va. 237, 239-40, 384 S.E.2d 752, 753 (1989).

B.

The defendant's argument regarding the enforceability of the non competition provision (paragraph 5) of the parties Agreement begins with a serious misstatement of the law. The defendant asserts that "A non-competition clause may not forbid 'activities in which [the employee was] not engaged,'" citing Richardson v. Paxton Company, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962). Brief for Appellee at 6. This is erroneous. The actual statement made by this court in Richardson is that a non competition clause may not forbid activities in which *the employer was* not engaged. Id. Through the insertion of different wording, of its own choosing, the defendant changes entirely the meaning of the statement made in that case by this court.

The defendant's entire argument in his brief, relative to the non competition provision (paragraph 5) of the parties Agreement, is an argument asserting *the merits* of his objection to the enforceability of the paragraph, as raised in his demurrer. Brief for Appellee at 6-8. The defendant makes the bald statement that the action of the circuit court, taken within the context of the consideration of a demurrer, in sustaining *on the merits* his objection to the enforceability of the non

competition paragraph is proper. Brief for Appellee at 7-8. The defendant offers no legal authority, for the court's consideration, in support of the statement he makes.

C.

The defendant's entire argument in his brief, relative to the non solicitation provision (paragraph 12) of the parties Agreement, is an argument asserting *the merits* of his objection to the enforceability of the paragraph, as raised in his demurrer. Brief for Appellee at 8-10. The defendant makes the bald statement that the action of the circuit court, taken within the context of the consideration of a demurrer, in sustaining *on the merits* his objection to the enforceability of the non solicitation paragraph is proper. Brief for Appellee at 9-10. The defendant offers no legal authority, for the court's consideration, in support of the statement he makes.

D.

The defendant cites to Modern Environments, Inc., v. Stinnett, 263 Va. 491, 561 S.E.2d 694 (2002) and Home Paramount Pest Control Companies, Inc. v. Schaffer, 282 Va. 412, 718 S.E.2d 762 (2011) as support for the proposition that the plaintiff is not entitled to an opportunity to meet its evidentiary burden of establishing the

validity of the non competition and non solicitation provisions of the parties Agreement. He states that it is proper for the circuit court to decide *the merits* of the enforceability of those provisions, on a demurrer, without hearing any evidence. Brief for Appellee at 10-11. The defendant has seriously misconstrued the law, as neither case offers any support for the proposition made by the defendant.

Modern Environments involved a declaratory judgment action brought by an employee seeking a declaration that the non-compete provisions of her employment contract were unenforceable because they were overbroad and contrary to public policy. Modern Environments, the employer, filed a demurrer and cross-bill seeking an injunction against the employee's further employment in violation of the non-compete clause. The trial court ruled, based solely on the parties briefs and oral argument, that the restrictive covenant in the employment agreement was overbroad and unenforceable as a matter of law. Modern Environments, 263 Va. at 493, 561 S.E.2d at 695.

Modern Environments did not offer any evidence in an attempt to meet its burden of proof of establishing the reasonableness of the contract clause in question, arguing, instead, that the non-compete

language at issue was reasonable and not overbroad as a matter of law.

This court, although upholding the ruling of the trial court, specifically noted that the question of the propriety of the invocation of the declaratory judgment statute by the plaintiff in the case was not raised by either party and the court expressed no opinion in that regard. Id. n.1.

On the question of the need to meet the evidentiary burden of proof to establish the reasonableness of the restrictive covenant at issue, this court held that Modern Environment "[H]as not carried its burden of showing that the restrictive covenant at issue is reasonable and no greater than necessary to protect a legitimate business interest." Id. at 495-96, 696. This court stated that Modern Environment, as the employer, had the burden to produce such evidence. Id. at 496, 696, n.4.

Far from supporting defendant's proposition that there is no right to an opportunity to meet the evidentiary burden of proof of establishing the validity of non-compete restrictive covenants in an employment contract, this court, in Modern Environment, stated that the employer has the burden to do so.

Home Paramount does not provide any support for defendant's proposition either. The language excised by the defendant from that case, and inserted into its brief, does not support the defendant's statement that the plaintiff has no right to an opportunity to put forth evidence in an effort to establish the validity of non competition restrictive covenants in an employment contract. Brief for Appellee at 10. To the contrary, this court stated that Home Paramount, as the employer, "[B]ore the burden of proving a legitimate business interest in prohibiting Shaffer from engaging in all conceivable activities while employed by a competitor." Home Paramount 282 Va. at 418, 718 S.E.2d at 765.

II. IN THE ALTERNATIVE: THE COURT'S ORDER OF AUGUST 27, 2012, SUSTAINING DEFENDANT'S DEMURRER, *IN ITS ENTIRETY*, WITHOUT LEAVE TO AMEND, AND DISMISSING THE *ENTIRE* COMPLAINT WITH PREJUDICE, ERRONEOUSLY FORECLOSED PLAINTIFF'S RIGHT TO PURSUE ITS LEGAL REMEDIES AGAINST THE DEFENDANT FOR IMPROPER USE OF AND FAILURE TO RETURN CONFIDENTIAL INFORMATION.

Argument:

The defendant's argument does not address the merits of the above assignment of error, in a substantive fashion and is irrelevant to the issue presented.

The defendant makes the bald statement that the circuit court properly held that the plaintiff had failed to state a claim for violation of the Agreement's confidentiality provisions and sustained the defendant's demurrer on those grounds. Brief for Appellee at 11. The defendant, however, fails to refer this court to any part of the record that shows that the circuit court actually made such a holding or to any underlying ruling of the court that shows that it sustained the defendant's demurrer on that ground.

III. IN THE ALTERNATIVE: THE COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF LEAVE TO AMEND ITS COMPLAINT TO ALLOW PLAINTIFF TO PURSUE ITS LEGAL REMEDIES AGAINST THE DEFENDANT FOR IMPROPER USE OF AND FAILURE TO RETURN CONFIDENTIAL INFORMATION.

Argument:

A.

The defendant's reliance upon this court's decision in Dade v. Anderson, 247 Va. 3, 439 S.E.2d 353 (1994), for the proposition that this court cannot review the circuit's decision to deny the plaintiff's request for leave to amend its complaint is misplaced. Brief for Appellee at 12-13.

In Dade, this court stated, *inter-alia*, that unless a party tenders to the trial court the proposed amended pleading or otherwise

proffers what it would allege, had leave to amend been granted, this court is unable to determine whether the trial court abused its discretion in denying the party's motion for leave to amend its pleading, as the record fails to show what amendments were sought to be made. Id. at 8, 356.

In the instant case, however, the allegations sought to be alleged, had leave to amend been granted, were already in the record and before the court. They were part of the allegations plaintiff alleged in its original complaint, the entire complaint, the court dismissed with prejudice on August 27, 2012. (App. 68 – 69).

On September 11, 2012, plaintiff filed a Motion for Reconsideration, requesting, *inter-alia*, that the court grant it leave to amend its original complaint so it would be able to assert the claims that the defendant breached paragraphs 10 and 17 of the parties Agreement, relative to the improper use of and failure to return confidential information to the plaintiff. (App. 70 – 73). The Motion for Reconsideration stated that the aforementioned claims, sought to be asserted, had been alleged in the plaintiff's original complaint in paragraphs 9, 10, 12 and 13. (App. 72).

Accordingly, the record before this court, fully shows "[W]hat amendments plaintiff sought to make, …." Id.

CONCLUSION

For the foregoing reasons and the reasons previously set forth in Appellant's Brief, the court's Orders of August 27, 2012, and September 17, 2012 should be vacated and the matter remanded for a correct and proper consideration of the matters presented, in accordance with the arguments set forth herein.

Respectfully submitted,

ASSURANCE DATA, INC.,
By Counsel

C. Dean Latsios
Virginia Bar No. 17350
Attorney for Appellant
Matthews, Snider & Fitzner
4161 Chain Bridge Road
Fairfax, Virginia 22030
Telephone: (703) 273-1131
Facsimile: (703) 273-1167
cdeanlatsios@msnflaw.com

CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(h) of the Supreme Court of Virginia has been complied with and that pursuant to the Rule, fifteen (15) bound copies of this Reply Brief of Appellant, and one (1) electronic copy on CD, have been hand-filed with the Clerk of the Supreme Court of Virginia and three (3) bound copies, and one (1) electronic copy on CD, have been served, via UPS Ground Transportation, to counsel for appellee, Mr. Christopher T. Craig, VSB No. 36983 and Mr. Lee Warren, VSB No. 77446, COOK, CRAIG AND FRANCUZENKO, PLLC, 3050 Chain Bridge Road, Suite 200, Fairfax, Virginia 22030, all on this 7th day of May, 2013.

C. Dean Latsios
Virginia Bar No. 17350
Attorney for Appellant
Matthews, Snider & Fitzner
4161 Chain Bridge Road
Fairfax, Virginia 22030
Telephone: (703) 273-1131
Facsimile: (703) 273-1167
cdeanlatsios@msnflaw.com