

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000306-MR

NORTHERN KENTUCKY ELECTRIC SERVICE, INC.
AND MICHAEL P. WISSMAN

APPELLANTS

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 02-CI-00240

LESLIE R. STONE

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

COMBS, CHIEF JUDGE: Michael Wissman and Northern Kentucky Electric Service, Inc., appeal from findings of fact, conclusions of law, and judgment of the Pendleton Circuit Court in litigation involving several issues arising from a dispute over an agreement to sever the business relationship of the parties. Leslie R. Stone filed a lawsuit to enforce the terms of an agreement governing the terms of his resignation from a closely held corporation. The agreement provided for a buy-back of his outstanding

shares, the payment of consulting fees, and a covenant not to compete. The appellants contend that the trial court erred in holding that Stone did not breach the covenant not to compete. For the following reasons, we affirm the judgment on appeal.

Leslie R. Stone and Michael Wissman formed Northern Kentucky Electric Service, Inc., (NKE), a commercial and industrial electrical contracting concern, in 1992. In the spring of 2001, Wissman informed Stone that he wanted to buy out Stone's shares of the corporation. Stone and NKE entered into an agreement for the corporation to buy back Stone's outstanding shares in the company for the sum of \$75,000.00. The agreement also anticipated that Stone would provide consultation services to NKE from time to time for which he would be paid the sum of \$175,000.00. Finally, the agreement included a covenant not to compete for which Stone would also be paid the sum of \$175,000.00. The non-compete agreement is set forth as follows:

4.1 In connection with this Agreement, Stone acknowledges that in the course of his employment with the Company he has become familiar with the Company's trade secrets and with other Confidential Information concerning the Company and that his services have been and are of special, unique and extraordinary value to the Company. Therefore, Stone agrees that, for a period of two years after the Resignation Date (the "Noncompete Period"), he shall not directly or indirectly own any interest in, manage, control, participate in, consult with, render services for or in any manner engage in any business involved in the business of the provision of electrical services sales, installation, maintenance or management for the commercial and industrial sectors, within any geographical areas in which the Company engages or plans to engage in such businesses. Nothing herein shall prohibit Stone from being a passive owner of not more than 5% of the outstanding stock of any class of a corporation which is publicly traded, so long as

Stone has no active participation in the business of such corporation.

4.2 During the Noncompete Period, Stone shall not directly or indirectly through another entity (i) induce any employee of the company to leave the employ of the Company or any of its subsidiaries or affiliates, or in any way interfere with the relationship between the Company and any employee thereof, (ii) hire any person who was an employee of the Company at any time during the employment by Stone at the Company or **(iii) induce or attempt to induce any customer, supplier, licensee, licensor, franchisee or other business relation of the Company to cease doing business with the Company**, or in any way interfere with the relationship between any such customer, supplier, licensee or business relation with the Company (including without limitation, making any negative or disparaging statements or communications regarding the Company). (Emphasis added.)

According to the terms of the agreement, Stone's total compensation of \$325,000.00 would be paid in equal installments over a four-year period, beginning six months after his resignation from the corporation. The financial arrangement was personally guaranteed by Wissman. Stone resigned on July 1, 2001, and the installment payments were set to begin on January 1, 2002.

In October 2001, Stone was approached by Denier Electric, another local commercial electrical contractor. Stone advised Denier Electric that he was bound by a covenant not to compete with NKE. Representatives of Denier Electric communicated with Wissman, who agreed that Stone could go to work for Denier Electric. However, Denier Electric did not make an offer of employment to him.

In November 2001, Stone was approached by another local commercial electrical contractor, TMI. Timothy Cleary, a part-owner and president of the company,

asked Stone to come to work for TMI. Stone again advised that he was bound by a covenant not to compete with NKE.

Cleary and Wissman were acquainted with one another. Although they shared the same geographical territory, none of their business relationships overlapped. NKE's business involved industrial settings, and TMI's business was concentrated almost exclusively upon churches, schools, and telecommunication providers.

Wissman and NKE did not object to Stone's decision to go to work for TMI. After TMI extended a formal offer to him, Stone asked Wissman to prepare a document memorializing Wissman's waiver of a portion of the covenant not to compete. On NKE letterhead, Wissman prepared a note that recited as follows:

You have informed me that you are going to work for an electrical contractor. Our buyout agreement contains a non compete clause. If your employer bids work in competition with us or hires anyone employed by us as of the date of our agreement, this will be a violation of our non compete agreement.

The letter was dated December 5, 2001. TMI promised Stone that it would not knowingly hire the employees of NKE nor would it bid work in competition with NKE. Stone began working for TMI the next day.

In January 2002, NKE began making the installment payments pursuant to the parties' agreement. Each payment included the sum of \$3,645.83, the portion allocated specifically to the covenant not to compete. These payments continued through May 2002.

On June 1, 2002, NKE failed to pay that portion of the installment covering the covenant not to compete. In a letter to Stone dated June 13, 2002, Wissman contended that Stone had violated the parties' agreement through his work with TMI. Therefore, Wissman advised that NKE would reduce the remaining monthly installments by the amount attributable to the value of the covenant not to compete.

In a written reply to Wissman, dated June 18, 2002, Stone denied that TMI had ever competed against NKE or that it had hired anyone ever employed by NKE. On the same day, NKE submitted a bid for electrical work to be performed at Gibson Lofts, a multi-dwelling condominium project in Cincinnati, Ohio, being constructed by a developer named Middle Earth. Middle Earth had been and was a customer of TMI. NKE had never before performed any services nor had it bid any work to perform any services for Middle Earth. NKE had performed electrical work on only one multi-dwelling project while Stone was with NKE and had resolved never to do such work again.

Wissman and NKE were aware that TMI had begun preliminary work on the Gibson Lofts project several months earlier. Because he had been hospitalized for surgery, Stone was out of the office until mid-to-late June 2002. Therefore, he was unable to complete and submit TMI's formal bid for the project at the end of May 2002. TMI submitted its official bid for the Gibson Lofts project to Middle Earth on July 3, 2002, and its bid was accepted. Prior to July 3, 2002, Stone was unaware that NKE had also submitted a bid to Middle Earth for the Gibson Lofts project. Stone's information

from Middle Earth indicated that the electrical contract would be awarded to TMI as a matter of course and that no other bid would be solicited.

On November 14, 2002, Stone brought an action against Wissman and NKE to recover the amounts owed under the non-compete provision of the parties' agreement. NKE and Wissman denied liability and filed a counterclaim alleging breach of contract and fraud.

Following a one-day bench trial, the court concluded that Stone had not breached any part of the parties' covenant not to compete. The court found that Stone had dealt forthrightly with NKE and Wissman. By authorizing Stone to go to work for TMI, the court reasoned that Wissman and NKE had waived that portion of the agreement restricting Stone's ability to render services to any commercial or industrial electrical contractor within the same geographical area. The court also concluded that Stone had never induced any employee of NKE to leave the company, nor had he hired anyone who had been employed by NKE at a time when he was also there. Finally, the court concluded that Stone had not induced or attempted to induce a customer of NKE to cease doing business with NKE per § 4.2 of the contract.

The court concluded also that Stone was not under any obligation to comply with the parties' agreement "subsequent to June 1, 2002, when the installment payment was not made or June 13, 2002 when NKE informed [Stone] that it would no longer make any payments upon the non-competition agreement." The court concluded that Wissman and NKE had breached the parties' agreement by failing and refusing to

pay Stone pursuant to the agreement. It concluded that NKE owed Stone the sum of \$145,833.33 – plus interest. The counterclaim was dismissed, and this appeal followed.

On appeal, Wissman and NKE contend that the trial court erred by failing to consider that the original agreement had been modified by the terms of Wissman's letter of December 5, 2001, written at Stone's request prior to his accepting employment with TMI. Wissman and NKE do not expressly dispute any of the trial court's findings of fact. Instead, they contend that the terms of the parties' formal agreement simply became irrelevant following Wissman's December 5 note to Stone – effectively arguing that the note suspended the formal agreement. They contend that the only issue relevant to a resolution of the dispute is the fact that Stone submitted a bid on Middle Earth's Gibson Lofts project in July 2002.

After closely examining the written arguments, the record, and the law, we find no error. We disagree with the position advanced by Wissman and NKE for several substantive reasons. We also note that the failure of Wissman and NKE to present this argument to the trial court prevents our consideration of it here.

Stone contends that since the issue was not considered by the trial court, it may not be reviewed on appeal. We agree. At trial, Wissman testified that he wrote the letter terminating payments on the non-compete agreement on June 13, 2002. Wissman testified that he believed that Stone had violated the covenant not to compete by communicating with Solar Solutions, a customer of NKE. Referring to a portion of the original agreement of July 1, 2001, Wissman contended that Stone had breached the

covenant not to compete by soliciting the business of Solar Solutions. Referring again to the specific terms of the parties' agreement of July 1, 2001, Wissman claimed that Stone's activity with Middle Earth constituted a separate breach of the covenant. With respect to his letter of December 5, 2001, Wissman explained that he merely aimed “to remind” Stone of the covenant not to compete included in the parties' agreement of July 1, 2001 – and not to memorialize their mutual agreement for Stone to work for TMI.

From our review of the record, we cannot conclude that Wissman and NKE ever addressed at trial the issue of whether the letter of December 5, 2001, replaced the July 1, 2001 agreement. It is axiomatic that “a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.” *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 459, 141 S.W.2d 859, 860 (Ky. 1940) (*citing Benefit Ass'n of Railway Employers v. Secrest*, 239 Ky. 400, 39 S.W.2d 682 (Ky. 1931)). Therefore, our review of this issue is precluded.

Wissman and NKE also contend that that the trial court “accepted Stone's distorted version of the key issue in this case because [it] wanted to issue a decision based on [its] sympathies towards Stone. . . .” Citing a conversation between the court and attorneys following the trial, Wissman and NKE argue that Stone was able to persuade the court to disregard the facts and the law because it was “sympathetic to Stone's position.” We disagree.

Our review of the record indicates that the trial court made extensive and specific findings of fact and that it engaged in a thorough analysis of the law. References

to comments purportedly made during the court's off-the-record statement to the attorneys following the trial do not support appellants' argument of impropriety or prejudice on the part of the trial court.

We affirm the findings of fact, conclusions of law, and judgment of the Pendleton Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENTS
FOR APPELLANTS:

Peter K. Newman
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BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Thomas E. Grossman
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