

Affirmed in Part; Reversed and Remanded in Part; and Opinion filed September 6, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-01338-CV

RIMKUS CONSULTING GROUP, INC., Appellant

V.

JOHN P. DUPRE, Appellee

**On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 98-24412**

OPINION

Rimkus Consulting Group, Inc. appeals from the trial court's grant of summary judgment in favor of its former employee, John P. Dupre, on Rimkus' claims of breach of an employment contract and misappropriation of trade secrets. Rimkus raises four issues claiming the trial court erred in: (1) determining the covenant not to compete was unenforceable and in denying Rimkus damages; (2) declining to reform the covenant; (3) awarding attorney's fees to Dupre; and (4) determining that the confidential information at issue was not a trade secret. We affirm in part, and reverse in part.

Rimkus, an engineering and consulting firm, hired Dupre, an engineer, on January 15, 1996. On March 18, 1996, Rimkus and Dupre executed an employment agreement which included a covenant not to compete. Rimkus terminated Dupre's employment on November 27, 1996. On December 1, 1996, Rimkus accepted a position at Unified Investigations & Sciences. On May 27, 1998, Rimkus filed an action against Dupre for breach of contract, tortious interference with an existing contract, and wrongful interference with prospective contractual relations. Specifically, Rimkus alleged that Dupre's position at Unified Investigations & Sciences violated the terms of the covenant not to compete and that he misappropriated Rimkus' trade secrets. On February 26, 1999, Dupre filed a no evidence motion for summary judgment on Rimkus' misappropriation of trade secrets claim. On April 13, 1999, Dupre filed a traditional motion for summary judgment on Rimkus' breach of contract claim. Dupre asserted that the covenant not to compete was unenforceable because: (1) it was not ancillary to or part of an otherwise enforceable agreement; and (2) it was an unreasonable restraint of trade. The trial court granted both of Dupre's motions and awarded Dupre attorney's fees pursuant to section 15.51 of the Texas Business and Commerce Code. In its order granting the latter motion, the court expressly held that the covenant not to compete was unenforceable because it was not ancillary to or part of an otherwise enforceable agreement.

Rimkus' first issue challenges the trial court's grant of Dupre's traditional motion for summary judgment on its breach of contract claim. It contains three sub-issues asserting the trial court erred in determining the covenant not to compete was unenforceable and in denying Rimkus damages. A defendant moving for "traditional" summary judgment has the burden of establishing that no genuine issue of material fact exists as to one or more essential elements of the plaintiff's cause of action and that the defendant is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). If the defendant meets this burden, the plaintiff must then raise a genuine issue of material fact on the targeted element of the plaintiff's cause of action. *Gonzalez v. City of Harlingen*, 814 S.W.2d 109, 112 (Tex. App.—Corpus Christi

1991, writ denied). When reviewing a summary judgment, we accept as true all evidence supporting the non-movant. *Nixon*, 690 S.W.2d at 549. We also indulge all inferences in favor of the non-movant, and likewise resolves all doubts in his favor. *Id.* Finally, because the propriety of summary judgment is a question of law, we must conduct a *de novo* review of the trial court's decision. *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 699 (Tex.1994).

In its first sub-issue, Rimkus challenges the trial court's determination that the covenant was not ancillary to an otherwise enforceable agreement. The validity and enforceability of a covenant not to compete are questions of law to be decided by the court. *Light v. Centel Cellular Co.*, 883 S.W.2d 642, 644 (Tex. 1994). When asked to determine the enforceability of a covenant not to compete, we are required to apply the criteria for enforceability defined within the Covenants Not to Compete Act, TEX. BUS. & COM. CODE ANN. §§ 15.50-15.52 (Vernon Supp. 2001). *Light*, 883 S.W.2d at 644. To be enforceable, a covenant not to compete must (1) be ancillary to or part of an otherwise enforceable agreement at the time the agreement was made and (2) contain limitations as to time, geographic area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than necessary to protect the goodwill or other business interest of the promisee. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 2001).

Dupre's employment at Rimkus was at-will. An at-will employment relationship cannot form an otherwise enforceable agreement to which a covenant not to compete can append. *Light*, 883 S.W.2d at 644-45. In an at-will employment relationship, any promise depending on commencement and continuation of employment is illusory and unenforceable at the time of contracting. *Id.* at 645. It is possible, however, in the context of an at-will employment relationship to form a bi-lateral contract within the context of the employment relationship by an exchange of non-illusory promises between the employee and employer. *Id.* Such an agreement will support a covenant not to compete as long as neither promise is dependent upon a period of continued employment. *Id.*

Rimkus asserts that its employment agreement with Dupre contains four non-illusory promises that are sufficient to serve as its consideration to satisfy the “otherwise enforceable agreement” requirement: (1) its promise to supply Dupre with in-company and external training; (2) its promise to provide Dupre with access to Rimkus’ customer names and files; (3) its promise to allow Dupre use of its proprietary and confidential information; and (4) its promise to give Dupre access to the company’s methods, systems, and techniques. We agree with the trial court’s determination that no otherwise enforceable agreement existed at the time covenant not to compete was executed. The employment agreement does not contain a promise to train. The agreement provides that Rimkus “may from time to time provide training to the employee” This statement does not commit Rimkus to provide training to Dupre and, thus, is an illusory promise which is insufficient to serve as consideration. *See id.* The second, third, and fourth promises identified by Rimkus may not serve as consideration for the agreement because the record evinces that Dupre was given access to Rimkus’ customer names and files, use of its proprietary and confidential information, and access to its methods, systems, and techniques prior to the execution of the employment agreement. Past consideration will not support a subsequent promise. *CRC-Evans Pipeline Intern. v. Myers*, 927 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1996, no writ). Accordingly, we sustain the trial court’s finding that the covenant not to compete was unenforceable.

Our finding that the covenant was unenforceable because it was not ancillary to or part of an otherwise enforceable agreement, abrogates the need for us to address Rimkus’ second and third sub-issues in which it contends the covenant was reasonable as to time, geographic, and scope restrictions, and that the trial court erred in finding as a matter of law that Rimkus’ interest in safeguarding its trade secrets and other confidential information was not entitled to protection under state law. Accordingly, we overrule Rimkus’ first issue. Our finding also negates the need for us to discuss Rimkus’ second issue in which it asserts the trial court erred in denying its request to reform the covenant. The Texas Business and Commerce Code permits reformation of a covenant not to compete

only when the covenant is found to be ancillary to or part of an otherwise enforceable agreement. TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 2001).

In its third issue, Rimkus asserts the trial court erred in awarding attorney's fees to Dupre pursuant section 15.51(c) of the Texas Business and Commerce Code. Section 15.51(c) authorizes the award of attorney fees if the trial court finds:

the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 2001). However, Rimkus aptly observes that the record is devoid of any evidence establishing the amount of fees that Dupre actually and reasonably incurred. Absent such evidence, the trial court may not make an award of fees. *Evan's World Travel, Inc. v. Adams*, 978 S.W.2d 225, 234 (Tex. App.—Texarkana 1998, no pet.). Accordingly, we sustain Rimkus' third issue.

In its fourth and final issue, Rimkus asserts the trial court erred in granting Dupre's no evidence motion for summary judgment on its claim for misappropriation of trade secrets. As distinguished from a traditional summary judgment, we review a no-evidence summary judgment under the same legal sufficiency standard as a directed verdict. *Speciality Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 146 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). We view all the evidence in a light most favorable to the respondent against whom the summary judgment was rendered, and disregard all contrary evidence and inferences. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). A no-evidence summary judgment is properly granted if the respondent fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the respondent's case. *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied); TEX. R. CIV. P. 166a(i). Less than a scintilla of evidence exists when the evidence is "so weak as to do no more

than create a mere surmise or suspicion” of a fact. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists when the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

To prevail on a claim of misappropriation of trade secrets by a former employee, an employer must demonstrate: (1) a trade secret existed; (2) the trade secret was acquired through a confidential relationship; and (3) the defendant used the trade secrets without authorization from the employer. *Avera v. Clark Moulding*, 791 S.W.2d 144, 145 (Tex. App.—Dallas 1990, no writ). Rimkus’ relied exclusively on the affidavit of Ralph S. Graham, its senior vice-president, to substantiate its claim that Dupre misappropriated its trade secrets. The affidavit, however, fails to indicate which trade secrets Dupre allegedly misappropriated. Moreover, Graham’s affidavit simply states that, “RCG [Rimkus] has learned that Dupre has knowingly and intentionally violated the provisions and covenants of his employment agreement.” Affidavits which contain conclusory statements that fail to provide the underlying facts to support the conclusion are not proper summary judgment evidence. *Dolcefino v. Randolph*, 19 S.W.3d 906, 930 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Accordingly, we overrule appellant’s fourth issue, affirm the trial court’s grant of summary judgment for Dupre, reverse the trial court’s award of attorney’s fees, and remand this cause to the trial court for further proceedings consistent with this opinion.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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