THOMAS V. GAVIN, 1910-NMSC-060, 15 N.M. 660, 110 P. 841 (S. Ct. 1910)

C. E. THOMAS, Appellant,
vs.
G. E. GAVIN, Appellee

No. 1316

SUPREME COURT OF NEW MEXICO

1910-NMSC-060, 15 N.M. 660, 110 P. 841

August 30, 1910

Appeal from the District Court for Chaves County before W. H. Pope, Chief Justice.

SYLLABUS

SYLLABUS (BY THE COURT)

1. An agreement not to engage in the business of buying and selling lumber in a certain town or its vicinity for two years in consideration of the purchase at stipulated prices of the entire stock of lumber of the seller then on hand in the business in which the seller is then engaged in the lumber business, is not void as being in restraint of trade.

2. While a single sale of lumber would not in itself amount to engaging in the lumber business, it would be evidence on the question whether the seller was engaging in that business and in connection with other circumstances might furnish sufficient proof that he was so engaged.

3. In an agreement for the sale of a stock in trade and that the seller for a time abstain from engaging in the business in which it was employed, there was a provision that a sum named should be considered liquidated damages in case of a breach of the agreement by either party to it. Held, that it was for the court to determine from the circumstances of the case whether the sum named should be considered a penalty or liquidated damages. And the trial court having found actual damages only instead of the stipulated sum, for a breach of such a contract, it was at liberty, in addition to its judgment for damages, to enjoin the defendant from further violating the agreement in question.

COUNSEL

R. D. Bowers for Appellant.

Contract was void because it was in restraint of trade. 2 Beach Cont., art. 175; Moore v. Bennett, 140 Ill. 69, 15 L. R. A. 364, 29 N. E. 891.

The proper measure of damages is the loss to plaintiff. Gregory v. Speiker, 110 Cal. 150, 42 Pac. 576; Peltz v. Eichele, 62 Mo. 171, 180; Lashus v. Chamberlain, 5 Utah 140, 13 Pac. 361; Howard v. Taylor, 90 Ala. 241, 8 So. 36; Warfield v. Booth, 33 Md. 63; 2 Sedgw. Dam. 632.

Reid & Hervey and J. M. O'Brien for Appellee.

The finding of fact is binding being based upon substantial evidence. Hancock v. Beasley, 14 N.M. 239, 91 Pac. 735.

The good will of a business is not the business but is one result springing out of it. McGowan v. Griffin, et al., Vt., 37 Atl. 298.

Measure of damages. Peltz, et al, v. Eichele, 62 Mo. 170, 180; Gregory v. Speiker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70, 74; Larkins v. Chamberlain, 5 Utah 140, 13 Pac. 361; Graham v. Plate, 40 Cal. 493; El Modello Cigar Co. v. Gato, 25 Fla. 886, 23 Am. St. Rep. 537; Avery v. Meikle, 85 Ky. 435, 7 Am. St. Rep. 604.

So long as the purchaser of good will continues in that business and the stipulation of the vendor not to engage in such business remains in force, the vendor cannot enter into competition with him either in his own account or as the agent or business manager of another. 20 Cyc. 1280; Meyers v. Laban, 51 La. Ann. 1726, 26 So. 463; Garvin v. Hawkins, 42 N. Y. Suppl. 603; Jefferson v. Market, 112 Ga. 498, 37 S. E. 758; Ewing v. Johnson, 34 Howard Pr., N. Y., 202, 205; Kramer v. Old, 119 N. Carolina 1, 25 S. E. 815, 56 Am. St. Rep. 650; 34 L. R. A. 389; Vonderbank v. Schmidt, 44 La. Ann. 264, 32 Am. St. Rep. 336.

JUDGES

Abbott, J.

AUTHOR: ABBOTT

OPINION

*{*661}* STATEMENT OF THE CASE.

{1} This is a suit in which the plaintiff, here the appellee, seeks to recover damages from the defendant, here the appellant, for the alleged breach of a written contract which *{*662}* was entered into between them on May 5, 1909, which contract contained the words:

"That, whereas the party of the first part (appellant) is the owner of a certain lot of lumber and building material and is engaged in the business of buying and selling such merchandise, but for reasons sufficient to himself, is desirous of closing out all of the said material and discontinuing the business, and the party of the second part is willing to purchase the same provided the first party will not again engage in such business in the city of Roswell, or vicinity for a period of two years from this date. * * *

"Now, therefore, in consideration of the above and foregoing the party of the first part agrees to sell and the party of the second part agrees to buy," etc.

{2} At the trial, which was by the district judge without a jury, it appeared that the defendant had sold to one Brooks a carload of lumber which, however, was ordered by him before May 5, 1909, but arrived and was delivered after that date, and had taken an order for a carload for one Levers after that date which for some reason he did not accept and for which the defendant found another customer. That the lumber was ordered from a mill located at St. Augustine, Florida, in which his brother was part owner and there was evidence to the effect that he derived profit from each transaction; that he claimed the right to take and fill similar orders in the future provided that he did not have a lumber yard and buy and sell lumber at it, as he had done before the agreement with Gavin, and that he meant to take and fill such orders as he had opportunity.

{3} It also appeared that the stock purchased by the plaintiff, amounted to $ 1,103.77 at the agreed price and that the plaintiff removed the same from the place where the defendant had been doing business and did not continue the business there. That the defendant expected to derive a profit from said transaction and to continue making like transactions, claiming that he had the right to take and forward orders for lumber to be delivered on the *{*663}* cars if he did not have an established place of business and buy and sell lumber at it.

OPINION OF THE COURT.

{4} The attorneys for the appellant claim that the provision of the contract in question that he should not engage in the business of buying and selling lumber in Roswell or the vicinity for a period of two years is void for being in restraint of trade. They attach significance to the fact that by the terms of the contract neither the business itself nor the good will of it was sold, but a quantity of lumber only. It is well settled both at the common law and under the anti-trust act that an agreement to refrain from engaging in a certain business within reasonable limits of time and place is valid if it is made as subsidiary to the main purpose of disposing of property employed in that business on better terms than could be obtained without such an agreement. To bring the transaction within that rule it is not necessary that the "good will" of the business should be in terms included in the sale. The seller might have obtained a stock of goods for the purpose of going into business, and have no business or "good will" to sell and through some change of circumstances be desirous of selling his stock of goods. It would be unreasonable to hold that he is forbidden in the public interest to better his chance of

making a sale by including in it and disposing of his right to engage in the proposed business in that place for a reasonable length of time. Wood v. Whitehead Bros. Co., 165 N.Y. 545, 551, 59 N.E. 357; United States v. Freight Assn., 166 U.S. 290, 329, 41 L. Ed. 1007, 17 S. Ct. 540; Hopkins v. United States, 171 U.S. 578, 600, 43 L. Ed. 290, 19 S. Ct. 40; Field v. Barber Asphalt Paving Co., 194 U.S. 618, 23, 48 L. Ed. 1142, 24 S. Ct. 784.

{5} The appellant denies, further, that he did engage in the business of buying and selling lumber in Roswell or the vicinity after the execution of the contract in question, contrary to its terms.

{6} There was evidence that ordering lumber by the carload for customers to be delivered without the expense of passing it through the lumber yard was an important feature of the lumber business in Roswell and that the *{*664}* appellant was to some extent doing business in that way at the time of his sale to the plaintiff since at least one car load of lumber he had so ordered arrived and was delivered after May 5, 1909, the date of his agreement with the plaintiff. The clear purpose of the agreement was to prevent the defendant from competing with the plaintiff in the lumber business in Roswell and vicinity, in any manner, and to that he should be held. Meyer v. Labau, 51 La. Ann. 1726, 26 So. 463; Jefferson v. Markert, 112 Ga. 498, 37 S.E. 758.

{7} It is true, as the defendant contends, that a single transaction does not generally speaking constitute "engaging in business." Nelson v. Johnson, 38 Minn. 255, 36 N.W. 868. But while the trial judge in his opinion filed in the cause refers to the order of the carload of lumber for Levers as being the breach of the defendant's contract on which the judgment was based, yet there were other circumstances which in his view must have given character to the transaction. To order a carload of lumber would not be a matter of daily or even frequent occurrence in a small business such as that of the defendant's obviously was. There would not, therefore, be many transactions of the kind in a limited length of time. There was evidence of only two from about the middle of April to some time in July. That evidence, coupled with the evidence that the defendant said he had the right notwithstanding his contract, to take orders for car load lots and meant to do it as often as he had the chance, warranted the trial court in finding that he was engaged in the lumber business. Abel v. State, 90 Ala. 631 at 631-3, 8 So. 760.

{8} It is true the defendant denied that he made the statement referred to, but the trial judge must have believed that he did since he made the injunction which had been prayed for against his engaging in business, permanent. The findings of the trial judge without a jury on questions of fact will ordinarily not be set aside by this court when there is substantial evidence to sustain them. Candelaria v. Miera, 13 N.M. 360, 84 P. 1020 and cases cited.

{9} The agreement between the plaintiff and defendant provided explicitly for the sum of $ 1,000 as liquidated *{*665}* damages in case either party should violate its terms. But "when the stated sum obviously and grossly exceeds any just measure of compensation" it is generally recognized that the court which has to pass on the

question can treat it as a penalty and award actual damages. Sutherland on Damages, Sec. 295, quoting at length from Perkins v. Lyman, 9 Mass. 522. See also 13 Cyc. 99, and cases cited, especially Smith v. Brown, 164 Mass. 584, 42 N.E. 101, and cases cited.

{10} In this case the lumber which the plaintiff agreed to buy of the defendant amounted, at the stipulated prices per thousand, to only $ 1,134.77. On a strict construction of their agreement for liquidated damages, the plaintiff would have had to pay the defendant $ 1,000 if he had refused to take the lumber, that is he would have had to pay practically its full value, and the defendant would still have had the lumber, which would have been little less than a **reductio ad absurdum.** And when, as it happened, the District Court found that the defendant had violated the agreement to the extent, so far as the evidence went, of the sale of a single car load of lumber only, it would have been manifestly against justice to fix the damages at $ 1,000, and we think, on the ground stated, the court was justified in awarding only what it found to be actual damages. Besides, the award of the full sum of $ 1,000 would, by the weight of authority, have left the defendant free from his obligation not to engage in business and Sutherland, sec. 298, declares that plaintiff in such a case may have his choice between the liquidated damages agreed upon and an injunction against engaging in business, but cannot have both.

{11} As the contract between the parties is entire, no action for damages would lie for any further breach of it. Some of the authorities go so far as to hold that even in such a case there can not be an injunction as well as a recovery of damages. We see no good reason, however, so to hold. In case of payment of the full amount of stipulated damages or judgment therefor, it may well be considered that the party liable for a breach of the agreement has suffered what was provided in case of such a breach as an alternative to keeping his agreement and is thus left free. But if instead, *{*666}* as in this case, judgment is rendered for only actual damages, before the expiration of the time of abstention from engaging in business agreed upon, the courts, we think, are warranted in protecting the injured party for the remainder of that time by injunction.

{12} The defendant avers that the District Court made the defendant's supposed profit instead of the plaintiff's loss by the sale of the car load of lumber in question, the measure of damages. It is true that in his opinion filed in the cause the trial judge may seem to intimate that such was the case, but a decision which is well founded in fact will not be disturbed because some of the actual grounds, and perhaps the strongest grounds for it, are not stated. Lockhart v. Wills, 9 N.M. 344, 359, 54 P. 336, citing Wisner v. Brown, 122 U.S. 214, 30 L. Ed. 1205, 7 S. Ct. 1156.

{13} Evidence of the profit made by the defendant was admissible as bearing on the question of the plaintiff's loss. But to that point there was also the evidence that the man for whom the car load of lumber was ordered was a customer of the plaintiff to whom he might naturally have sold any lumber he required and that the defendant claimed and was exercising the right to take orders for car load lots of lumber and so was in

competition with the plaintiff, thereby, of necessity in a comparatively small town, affecting his business injuriously.

{14} The amount of damages awarded was justified by the evidence. The judgment of the District Court is affirmed.