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Case Comment

Civil Law: SJC Contextualizes Anti-Raiding Provisions

Automile Holdings LLC v. McGovern, 483 Mass. 797 (2020)

Automile Holdings LLC v. McGovern (*Automile*) provides useful guidance with respect to two areas of uncertainty under Massachusetts law: whether and under what circumstances restrictive covenants that prohibit the solicitation of a company's employees — so called "anti-raiding" provisions — might be permissible; and whether and when a trial judge may extend a restrictive covenant beyond its plain terms as a remedy for breach in the context of the sale of a business.[1]

At common law in Massachusetts, covenants restricting competition are only enforceable to the extent that they are reasonable. "[A] restrictive covenant is only reasonable, and thus enforceable,[2] if it is: (1) necessary to protect a legitimate business interest; (2) reasonably limited in time and space; and (3) consonant with the public interest."[3] While the use of anti-raiding provisions is not new in Massachusetts, Supreme Judicial Court (SJC) precedent affirming their permissibility did not exist prior to *Automile*.[4] *Automile* affirms that anti-raiding provisions will be enforced on par with other restrictive covenants to the extent that they are reasonable.[5] In reaching this conclusion, the SJC reminds us that the context in which a restrictive covenant arises is critical to the determination of whether that covenant serves a legitimate business interest.[6]

After determining that the anti-raiding provision at issue was enforceable, the SJC ruled that the trial court abused its discretion by ordering an extension of that provision beyond its plain terms.[7] Nevertheless, the SJC predicted that such an extension "may be proper, but only if the party seeking to expand the terms of the restrictive covenant has demonstrated that monetary damages would provide inadequate relief."[8]

Facts and Procedural History

A. The Formation of Prime

In 2007, David Rosenberg; his friend, David Abrams; and defendant Matthew McGovern founded "Prime Motor Group," the trade name for the collective operations of a series of closely held limited liability companies that included Automile Holdings LLC and the other named plaintiffs[9] (collectively, "Prime").[10] Rosenberg and McGovern took minority interests in Prime.[11] Abrams' investment company took the majority interest.[12] McGovern began as Prime's chief financial officer, later transitioning to vice president of operations.[13] Rosenberg was Prime's president and chief executive officer.[14]

B. McGovern Sells His Interest in Prime, Agrees to Anti-Raiding Provision

In 2016, following disagreements between Rosenberg and Abrams, on one side, and McGovern, on the other, concerning

1. 483 Mass. 797, 798-819 (2020).
2. *See id.* at 808 (citing Whitinsville Plaza Inc. v. Kotseas, 378 Mass. 85, 102 (1979); All Stainless Inc. v. Colby, 364 Mass. 773, 778 (1974); Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310, 312 (1982)). This rule reflects the "public interest in the ability of individuals to be able to carry on their trade freely." *Id.* (citing Club Aluminum Co. v. Young, 263 Mass. 223, 226 (1928); *Kroeger*, 13 Mass. App. Ct. at 312).
3. *Id.* (citing Boulanger v. Dunkin' Donuts Inc., 442 Mass. 635, 639 (2004)).
4. *Id.* ("[T]he permissibility of anti-raiding provisions has not yet been addressed by this court."). Several Superior Court decisions have analyzed and enforced non-solicitation provisions, but these decisions rarely consider anti-raiding provisions in isolation. *See, e.g.*, Getman v. USI Holdings Corp., No. 05-3286, 2005 WL 2183159, at *2 (Mass. Super. Ct. Sept. 1, 2005) (Gants, J.); *see also* BNY Mellon, N.A. v. Schauer, No. 201001344, 2010 WL 3326965, at *8 (Mass. Super. Ct. May 14, 2010) (Hinkle, J.).
5. *Id.* at 812-14.
6. *Id.* at 811-12.
7. Automile Holdings LLC v. McGovern, 483 Mass. 797, 799 (2020).
8. *Id.* at 817.
9. AMR Real Estate Holdings LLC; AMR Real Estate Holdings LLC, Hanover Series; AMR Real Estate Holdings LLC, Westwood Series; AMR Real Estate Holdings LLC, West Roxbury Series; AMR Real Estate Holdings LLC, West Roxbury II Series; AMR Real Estate Holdings LLC, Walpole Series; AMR Real Estate Holdings LLC North Hampton Series; AMR Real Estate Holdings II LLC; Saco Auto Holdings LLC; Saco Real Estate Holdings LLC; Real Estate Holdings LLC, Saco I Series; Saco Real Estate Holdings LLC, Saco II Series; Saco Real Estate Holdings LLC, Saco III Series; Saco Real Estate Holdings LLC, Saco IV Series; AMR Auto Holdings-TY, LLC; AMR Auto Holdings-TH LLC; AMR Auto Holdings-TO LLC; and AMR Auto Holdings-LN LLC. *Id.* at 797 n.1.
10. *Id*. at 799.
11. *Id.*
12. *Id.*
13. Automile Holdings LLC v. McGovern, 483 Mass. 797, 799 (2020).
14. *Id*.

whether to sell Prime to a third party, Rosenberg and Abrams terminated McGovern's employment by Prime.[15]

After McGovern rejected a buyout offer from Rosenberg,[16] Rosenberg and Abrams put "as much pressure as they could . . . on McGovern to take the best deal they could get in purchasing McGovern's minority stake before [an] anticipated liquidity event," including amending Prime's operating agreements to eliminate distributions to cover the individual tax liability of its members, denying McGovern access to Prime's financials, and threatening to contact the authorities unless McGovern and his wife returned the company vehicles they had been using.[17] McGovern, meanwhile, intended to create a competing company, McGovern Motors.[18] Short on cash to pay his taxes and fund his new venture, McGovern entered into new negotiations with Rosenberg and Abrams to sell his minority interest in Prime.[19]

In October 2016, Rosenberg and Abrams agreed to purchase McGovern's interest based on a June 2016 valuation in exchange for McGovern agreeing to not, directly or indirectly, "hire or solicit any employee or consultant of [Prime] or encourage any such employee or consultant to leave such employment or hire any such employee or consultant who has left such employment, except pursuant to a general solicitation which is not directed specifically to any such employees" (2016 Agreement).[20] The anti-raiding provision in the 2016 Agreement was for a period of 18 months, with an April 2018 expiration.[21]

C. McGovern Hires Former Prime Employees, Agrees to Second Anti-Raiding Provision

Over the next several months, McGovern hired at least 15 former Prime employees to work at McGovern Motors.[22] Rosenberg threatened to sue; McGovern insisted that his hiring fit within the "general solicitation" exception in the restrictive covenant.[23] To avoid the cost of litigation, the parties entered into a more robust, superseding anti-raiding agreement in February 2017, which eliminated the "general solicitation" exception and extended the restrictive period by four months, ending August 2018 (2017 Agreement).[24]

In the event of a breach of the anti-raiding provision by McGovern, the 2017 Agreement provided that "Prime shall be entitled to all damages and remedies available under applicable law, and further, McGovern and McGovern Motors consent to the entry of preliminary or permanent injunctive relief as a remedy for a violation of this Agreement, without the need to prove irreparable harm or to post a bond."[25]

D. McGovern Breaches the 2017 Agreement, Prime Seeks Injunctive Relief

Shortly after entering into the 2017 Agreement, McGovern breached.[26] In August 2017, Prime learned that McGovern had hired former Prime employee Courtney Price and demanded that McGovern fire her.[27] McGovern complied.[28] In the fall, Prime learned that McGovern had hired former Prime employee Greg Howle, whom Prime had fired.[29] Prime promptly filed an action in the Business Litigation Session of the Suffolk County Superior Court seeking a preliminary injunction to enjoin McGovern from employing Howle and an order extending the anti-raiding provision in the 2017 Agreement by an additional 18 months.[30] The trial court declined to enjoin McGovern from continuing to employ Howle, finding that Prime's otherwise legitimate interest in preventing a former senior executive from poaching employees did not apply to a former employee whom Prime had elected to fire.[31]

E. McGovern Hires Three More Former Prime Employees, Prime Moves Again for an Injunction

McGovern went on to hire three more Prime employees: Timothy Fallows, James Tully and Zachary Casey.[32] Fallows left Prime in the spring of 2017 and worked briefly for two other dealerships before being hired by McGovern in November 2017.[33] Tully worked as a sales consultant and, later, commercial vehicle manager at Prime.[34]

15. *Id.* According to McGovern, Rosenberg wanted "to sell the Prime business so that he could focus on his interest in the burgeoning Massachusetts marijuana industry." Brief for Appellant at 13, Automile Holdings LLC v. McGovern, 483 Mass. 797 (2020) (SJC-12740). But McGovern was unwilling to sign a non-compete as part of the sale because "he had dedicated his career to the automotive industry and was not prepared to 'start over' at age forty-five." *Id.*
16. At the time of McGovern's termination by Prime, Rosenberg offered to purchase McGovern's interest in Prime at a 30% discount from fair market value, provided that McGovern executed a five-year non-solicitation agreement. *Automile*, 483 Mass. at 799-800.
17. *Id.* at 800 (internal quotation marks omitted).
18. *Id.*
19. *Id.* at 800-01.
20. *Id.*
21. *Id.* at 801.
22. Automile Holdings LLC v. McGovern, 483 Mass. 797, 801 (2020).
23. *Id.*
24. *Id.* The non-solicitation provision in the 2017 Agreement required McGovern not to "directly or indirectly . . . solicit for hire" Prime employees, "or encourage [Prime employees] to leave the employment" of Prime. *Id.* at 801-02 (alterations in original).
25. *Id.* at 802.
26. *See id.* at 802.
27. *Id.*
28. Automile Holdings LLC v. McGovern, 483 Mass. 797, 802 (2020).
29. *Id.*
30. *Id.*
31. *Id.* at 802-03; see Excerpt of Preliminary Injunction Hearing at 3, Automile Holdings LLC v. McGovern, C.A. No. 1784CV03809 (Suffolk Super. Ct., Dec. 21, 2017).
32. *Automile*, 483 Mass. at 803.
33. *Id.*
34. *Id.*

When Tully resigned from Prime in April 2017, Rosenberg sent an internal email stating that it was a "good thing" because Tully was "[w]ay overpaid, and thinks he deserves more."[35]

Casey had risen rapidly through the ranks at Prime to become a general manager of three Prime dealerships in Maine.[36] In connection with his ascension, Prime paid for Casey to attend a year-long training program out of state.[37] Casey met with McGovern in the fall of 2017 to discuss buying equity in McGovern Motors, after which Casey resigned from Prime and agreed to buy McGovern's interest in a Nashua, New Hampshire, Toyota dealership that was part of McGovern Motors.[38] To fund his purchase of the dealership, Casey used money loaned to him by McGovern.[39]

After learning that Casey had gone to work with McGovern, Prime again sought a preliminary injunction to enforce the anti-raiding covenant in the 2017 Agreement.[40] In opposition, McGovern filed an affidavit averring that Casey was not an employee, but, rather, had purchased McGovern's interest in the dealership.[41] McGovern's affidavit omitted the facts that McGovern had financed Casey's purchase, that Toyota had yet to approve the sale, and that Toyota's approval was prerequisite to consummation of the purchase.[42]

When Rosenberg learned that the sale to Casey might be a sham transaction, he alerted Toyota.[43] After Toyota threatened to terminate its relationship with the Nashua dealership, McGovern and Casey rescinded the sale.[44] Casey remained general manager of the Nashua dealership.[45]

Following a period of expedited discovery, Prime renewed its motion to enjoin McGovern from continuing to employ Fallows, Tully and Casey, and requested an 18-month extension of the anti-raiding provision.[46] Prime also amended its complaint to include claims for damages based on breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contractual and advantageous relations, and misappropriation of trade secrets.[47]

Following a hearing on Prime's motion that was consolidated with a jury-waived trial on the merits of Prime's claim for injunctive relief,[48] the lower court ruled that McGovern had breached the 2017 Agreement's anti-raiding provision by hiring Fallows, Tully and Casey.[49] But the lower court did not enjoin McGovern from continuing to employ any of them.[50] With respect to Fallows and Tully, the lower court concluded that an injunction would not advance Prime's legitimate business interests because neither was a particularly valued employee.[51] With respect to Casey, the lower court concluded that, while Casey was "just the kind of employee that the anti-raiding provision[] . . . w[as] designed to protect from solicitation by McGovern," there was "no way that the Court [could] order . . . Casey's relationship with Prime to be repaired."[52]

The lower court concluded that, "if Prime is able to establish that it suffered any damages as a result of the breach of contract as it relates to . . . Casey, then it would be entitled to monetary relief."[53] The lower court also extended the anti-raiding provision in the 2017 Agreement by one year, to August 2019, though the judge conceded that the law permitting him to do so was "less than clear."[54]

The lower court certified its order as a separate and final judgment pursuant to Mass. R. Civ. P. 54(b), from which McGovern appealed.[55] On appeal, McGovern argued that the anti-raiding provision was not enforceable because it was not necessary to protect a legitimate business interest.[56] McGovern also argued that the lower court exceeded its equitable authority by extending the anti-raiding provision by one year.[57] The SJC transferred the appeal on its own motion.[58]

Discussion

1. Anti-Raiding Provisions

In determining whether a restrictive covenant is necessary to protect a legitimate business interest, *Automile* reminds us that context

35. *Id.* (alteration in original).
36. *Id.*
37. *Id.*
38. Automile Holdings LLC v. McGovern, 483 Mass. 797, 804 (2020).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Automile Holdings LLC v. McGovern, 483 Mass. 797, 804 (2020).
45. *Id.* at 804-05.
46. *Id.* at 805.
47. *Id.* at 805 n.12.
48. *See* Mass. R. Civ. P. 65(b)(2).
49. *Automile*, 483 Mass. at 806.
50. *Id.*
51. *Id.*
52. *Id.* (quoting lower court oral findings). The lower court was also concerned that such an injunction would unfairly punish Casey, who was not a defendant in the case, and who had apparently moved his family to New Hampshire and enrolled his children into a new school in connection with his new position at McGovern Motors. *See id.*
53. *Id.* at 807 (quoting lower court oral findings).
54. *Id.* (quoting lower court oral findings).
55. Automile Holdings LLC v. McGovern, 483 Mass. 797, 807 (2020).
56. Brief for Appellant at 38-51, Automile Holdings LLC v. McGovern, 483 Mass. 797 (2020) (SJC-12740). McGovern did not argue that the provision was unreasonable in scope or injurious to public interest. *See id.* at 7-52.
57. *Id.* at 26-37.
58. *Automile*, 483 Mass at 807. Before reaching the merits of the appeal, the SJC acknowledged that the anti-raiding provision, including the one-year extension imposed by the trial court, had expired. Nevertheless, the SJC exercised its "discretion to reach the merits . . . regardless of whether the matter may currently be moot, because the issues are significant and have been fully briefed and it is in the public interest to do so." *Id.* at 807-08 (internal marks omitted).

is critical.[59] "In the employer-employee context, the legitimate business interests that may be protected consist of trade secrets, confidential information, and good will."[60] In the context of the sale of a business, however, there is no exhaustive list of what constitutes a legitimate business interest.[61] "Rather, unreasonableness in time, space, or product line, or obstruction of the public interest, are the principal bars to enforcement."[62] Ostensibly, McGovern's situation presented a somewhat hybrid set of facts.[63]

On one hand, McGovern was a former executive, the sale of his interest was not a typical arm's-length transaction in light of the pressure being applied by Rosenberg and Abrams, and the anti-raiding provision was undoubtedly related, at least in part, to the knowledge McGovern had acquired in his role as employee rather than as minority owner.[64] On the other hand, McGovern was fired prior to either the 2016 Agreement, which concerned the sale of McGovern's interest, or the 2017 Agreement, which concerned the settlement of a dispute. McGovern received a premium for his otherwise illiquid and unmarketable minority interest, was assisted by counsel, and had substantially more bargaining power than an ordinary employee.[65] On balance, it was not difficult for the SJC to conclude that the anti-raiding provision at issue was primarily related to the sale of a business.[66]

In that context, the SJC easily concluded the anti-raiding provision was necessary to protect a legitimate business interest.[67] Several factors supported its conclusion. First, the anti-raiding provision at issue was specifically and uniquely extracted from McGovern, as opposed to a *pro forma* restriction imposed on all Prime employees.[68] Second, "[f]ar from stifling ordinary competition, the restrictive covenant permitted McGovern to compete so long as he did not use his inside knowledge to raid Prime's key employees."[69] As the SJC noted, "McGovern was familiar with Prime's employee workforce and was well placed to identify key employees integral to the company's success," as well as knowledgeable about "salary structure and internal management dynamics," all of which could be leveraged effectively to solicit.[70] Third, McGovern received a premium for his interest in Prime in connection with the 2016 Agreement, and the 2017 Agreement was designed to reinforce the anti-raiding provision after a dispute about whether McGovern had honored his commitment.[71] Under those circumstances, the anti-raiding provision could be seen as serving Prime's "legitimate business interest of ensuring that McGovern did not 'derogate from the value of the business' interest he sold to the other owners of Prime in 2016."[72] Each of these factors supports the conclusion that the covenant was not designed to restrict ordinary competition, but, rather, that it was designed to restrict unfair competition.[73]

While *Automile's* holding is limited to the context of the sale of a business, the decision strongly implies that the SJC would hold that an anti-raiding provision was necessary to protect a legitimate business interest in the employee-employer context as well, under the right circumstances.[74] As discussed, "legitimate business interests" in the employee-employer context are limited to the protection of trade secrets, confidential information, and good will.[75] It is not difficult to imagine circumstances under which an anti-raiding provision could protect these business interests. In *Automile*, for example, had McGovern still been chief financial officer, then vice president of operations at Prime, but never had an ownership interest, then the anti-raiding provision would still have been arguably necessary to protect against misuse by McGovern of his knowledge about "salary structure and internal management dynamics," to the extent either of those things could be deemed trade secrets or confidential information.[76] In any event, the SJC's overriding concern appears to be that the anti-raiding provision, as with any other restrictive covenant, protects not against ordinary competition, but against unfair competition.[77]

59. *See id.* at 808-10. Of note, though it had not previously analyzed anti-raiding provisions, the SJC did not pause to consider whether an anti-raiding provision is sufficiently similar to other restrictive covenants to warrant the same analysis. *See id.* In Oxford Global Resources LLC v. Hernandez, the SJC observed that the Superior Courts had applied the "same principles" applicable to non-competition agreements when analyzing the enforceability of non-solicitation provisions. 480 Mass. 462, 470-71 (2018). The alleged misconduct in Hernandez and cases cited, however, concerned the solicitation of a company's customers, not its employees. *Id.*

60. *Automile*, 483 Mass. at 810 (citing New England Canteen Serv. Inc. v. Ashley, 372 Mass. 671, 674 (1977)).

61. *See id.* ("[R]estrictions are not rendered unenforceable merely because they protect an interest we might not recognize in any employment setting." (internal quotations omitted)).

62. *Id.* at 810 (internal quotation marks omitted).

63. *Id.*

64. *See id.* at 810-11.

65. *See id.* at 810-12.

66. Automile Holdings LLC v. McGovern, 483 Mass. 797, 810-12 (2020).

67. *Id.* at 813-15.

68. *See id.* at 813.

69. *Id.*

70. *Id.*

71. *Id.*

72. Automile Holdings LLC v. McGovern, 483 Mass. 797, 814 (2020) (quoting Boulanger, 442 Mass. at 645-46). Preventing the restricted party from derogating from the value of the business was recognized in earlier cases as a legitimate business interest in the sale of a business context. *See Boulanger,* 442 Mass. at 645-46; Wells v. Wells, 9 Mass. App. Ct. 321, 324 (1980).

73. *See Automile*, 483 Mass. at 812-15.

74. *See id.*

75. *Id.* at 810.

76. *See* Mass. Gen. Laws c. 93, § 42(4) (2018) (defining "trade secret"); Viken Detection Corp. v. Videray Techs Inc., 384 F. Supp. 3d 168, 177 (D. Mass. 2019) ("A trade secret is any confidential information used in the plaintiff's business that gives the owner an advantage over competitors who do not know or use it." (internal quotation marks omitted)). Prime did not advance this argument on appeal. *See* Appellee's Brief at 7-58, Automile Holdings LLC v. McGovern, 483 Mass. 797 (2020) (SJC-12740).

77. *Automile*, 483 Mass. at 812-15.

2. Equitable Powers

After affirming the enforceability of the anti-raiding provision, the SJC vacated the trial court's order extending that provision beyond its plain terms.[78] Relying on basic "freedom of contract principles," the SJC reasoned that, "generally, parties are held to the express terms of their contract."[79] In so doing, however, the SJC provided guidance for courts and practitioners alike concerning the circumstances under which an order to extend the contract term might be appropriate.[80]

Again, context is critical. In the employer-employee context, the SJC "ha[s] emphasized the gravity of, and ha[s] strictly enforced, restrictions on awarding equitable relief beyond the scope of a restrictive covenant" because "such agreements serve as a direct restraint on an individual employee's ability to earn a living."[81] The SJC declined in *Automile* to consider whether restrictive covenants might ever be permissibly extended beyond their plain terms in this context.[82]

In the sale of a business context, however, the SJC concluded that an extension of the provision's term might be appropriate, but only if the proponent could demonstrate that money damages would be inadequate.[83] Such a demonstration requires the proponent to "demonstrate why monetary damages cannot be reasonably estimated, or calculate the monetary damages incurred and demonstrate why damages would nonetheless be insufficient such that extraordinary relief is warranted."[84]

Recognizing the inherent difficulty in proving the inadequacy of money damages,[85] the SJC reminded practitioners of a simpler path.[86] Prime could have insisted on including a tolling agreement in the 2016 Agreement or the 2017 Agreement that automatically extended the term of the anti-raiding provision upon breach either for a fixed period or during the pendency of litigation.[87] At the time of the 2017 Agreement, in particular, Prime believed that McGovern had already breached the anti-raiding provision in the 2016 Agreement, and therefore had every incentive to insist on including a tolling provision in the 2017 Agreement that would have extended the term of the restrictive covenant by agreement.[88] Implicitly, the SJC reasoned that the very same "freedom of contract principles" that precluded extension of the restrictive covenant beyond its plain terms in equity might successfully be invoked to uphold an agreed-upon extension at law.[89]

Because McGovern's appeal was from a Rule 54(b) separate and final judgment that followed a trial on Prime's claim for injunctive relief, there was no evidence concerning damages, or their putative inadequacy, in the record.[90] Accordingly, the SJC remanded the case to the trial court for further proceedings.[91]

Conclusion

Automile contains valuable lessons for litigators and transactional attorneys alike. First, anti-raiding provisions will be enforced on par with other restrictive covenants. Second, context is critical when determining whether an anti-raiding provision, or any other restrictive covenant, serves to protect a legitimate business interest, or whether it might permissibly be extended in equity if money damages are proven to be inadequate. Finally, while it will be difficult to convince a court to extend a restrictive covenant beyond its plain terms, it is comparatively simple to include an enforceable, self-executing provision that tolls the restrictive covenant upon breach.

— Matthew A. Kane

78. *Id.* at 819.

79. *Id.* at 817 (quoting TAL Fin. Corp. v. CSC Consulting Inc., 446 Mass. 422, 430 (2006)).

80. *See id.* at 817-19.

81. *Id.* at 816 (citing All Stainless Inc., 364 Mass. at 777; Sherman v. Pfefferkorn, 241 Mass. 468, 477 (1922)).

82. *See id.* at 816 n.18.

83. Automile Holdings LLC v. McGovern, 483 Mass. 797, 817 (2020).

84. *Id.*

85. *Id.* at 818 ("[T]he task of quantifying the consequences of violating a noncompetition clause is a particularly difficult and elusive one." (quoting *Kroeger*, 13 Mass. App. Ct. at 322)).

86. *Id.* at 818 n.21.

87. *Id.*

88. *See id.* at 801-02, 818 n.21.

89. Automile Holdings LLC v. McGovern, 483 Mass. 797, 817, 818 n.21.

90. *Id.* at 818.

91. *Id.* at 819.