MIELE v. FOUNDATION MEDICINE INC (2025)

Supreme Judicial Court of Massachusetts,

Susan MIELE v. FOUNDATION MEDICINE, INC.

SJC-13697

Decided: June 13, 2025

Dawn Mertineit, Boston (Dallin R. Wilson, Boston, also present) for the defendant. Jeffrey M. Rosin (Lauren B. Bressman also present) for the plaintiff. The following submitted briefs for amici curiae: Ben Robbins & Natalie Logan for New England Legal Foundation. Russell Beck, Boston, Stephen D. Riden, Boston, Nicole Corvini, & Sarah C.C. Tishler for Russell Beck. Catherine M. Scott for Massachusetts Defense Lawyers Association, Inc.

In this case, we answer the following reported question regarding the Massachusetts Noncompetition Agreement Act, G. L. c. 149, § 24L (act):

"Does G. L. c. 149, § 24L, the Massachusetts Noncompetition Agreement Act, apply to a non-solicitation agreement incorporated into a termination agreement if the termination agreement includes a forfeiture provision in the event that the employee breaches the non-solicitation agreement?"1

We conclude it does not. That is, for the reasons we discuss below, we conclude that a forfeiture clause triggered by a breach of a nonsolicitation agreement does not constitute a "forfeiture for competition agreement" within the meaning of the act. See G. L. c. 149, § 24L (a). Accordingly, the judge erred in granting the motion for judgment on the pleadings, even in part. The order is reversed, and the matter is remanded for further proceedings consistent with this opinion.[2]

Background. We recount the facts as drawn from the parties' pleadings and attached exhibits, see Mullins v. Corcoran, 488 Mass. 275, 276, 172 N.E.3d 759 (2021), as well as facts otherwise incorporated

by the pleadings, see Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 723, 985 N.E.2d 388 (2013).

1. Facts. In 2017, Foundation Medicine, Inc. (FMI), hired Susan Miele, who, as a condition of employment, signed a "Non-Competition, Non-Solicitation, Confidentiality and Assignment Agreement" (restrictive covenant agreement). That agreement included a nonsolicitation provision barring Miele -- during her employment and for one year thereafter -- from "directly or indirectly . solicit[ing], entic[ing] or attempt[ing] to persuade any other employee or consultant of [FMI] to leave the services of [FMI] for any reason" or otherwise participating in or facilitating his or her hire by Miele's subsequent employer.

In 2020, Miele and FMI executed a "Transition Agreement" (transition agreement) in connection with her separation from the company. The agreement expressly incorporated the restrictive covenant agreement by reference, stating its terms "remain[ed] binding and enforceable in all respects." In exchange for certain transition benefits, the transition agreement included a forfeiture clause providing that, if Miele committed a breach of that agreement or any other agreement with FMI, any unpaid benefits would be forfeited and any previously paid benefits "must be immediately repaid" to FMI. FMI ultimately paid Miele approximately $1.2 million in transition benefits.

In 2021, following her departure from FMI, Miele joined Ginkgo Bioworks (Ginkgo). FMI alleges that during the one-year period following her departure from FMI, Miele subsequently recruited several then-current FMI employees to work at Ginkgo. FMI subsequently notified Miele of her alleged breach of the transition agreement and, pursuant to the forfeiture clause, ceased further payments and demanded repayment of benefits already disbursed. Miele refused to comply with that demand.

2. Procedural history. In late 2021, Miele sued FMI, alleging that FMI committed a breach of the transition agreement by withholding her transition benefits. FMI counterclaimed for breach of contract, asserting that Miele violated both the transition agreement and the restrictive covenant agreement, and sought a judgment declaring that it was not obligated to pay her any remaining transition benefits.

Miele moved for judgment on the pleadings, arguing, in relevant part, that the provisions underlying FMI's counterclaims were unenforceable under the act. While the act expressly does not apply to nonsolicitation agreements, Miele contended that it applied here because "[i]t is the forfeiture of the [remaining severance benefits] that makes the covenant not to solicit . subject to the [act]." In response, FMI maintained that the act was inapplicable, emphasizing that it governs only "noncompetition agreements" and expressly excludes nonsolicitation agreements.

A Superior Court judge granted Miele's motion in part, ruling that FMI could not enforce the forfeiture provision of the transition agreement. The judge denied the motion in part, however, concluding that FMI's inability to recover on its counterclaim for breach of the transition agreement did not preclude it from asserting Miele's breach of the restrictive covenant agreement as a defense to her breach of

contract claim or from seeking damages for that alleged breach. The judge noted that the act defines "noncompetition agreement" to include a "forfeiture for competition agreement[ ]" -- one that "imposes adverse financial consequences on a former employee" for engaging in competitive activity following termination. G. L. c. 149, § 24L (a).

Although the act expressly excludes nonsolicitation agreements from its scope, the judge concluded that the transition agreement qualified as a "forfeiture for competition agreement" and was therefore subject to the act. The judge reasoned that the agreement imposed "adverse financial consequences on Miele," specifically, forfeiture of transition benefits, based on her solicitation of former FMI colleagues to join her at Ginkgo. Accordingly, the judge rejected FMI's categorical position that all nonsolicitation agreements fall outside the act, concluding instead that such agreements are excluded only if they do not impose forfeiture for breach.

FMI moved to report the interlocutory ruling to the Appeals Court, which the judge allowed. Subsequently, the judge reported the following question:

"Does G. L. c. 149, § 24L, the Massachusetts Noncompetition Agreement Act, apply to a non-solicitation agreement incorporated into a termination agreement if the termination agreement includes a forfeiture provision in the event that the employee breaches the non-solicitation agreement?"

This court then allowed FMI's application for direct appellate review.

Discussion. The act, G. L. c. 149, § 24L (a)-(f), "sets forth the requirements for an employee noncompetition agreement to be enforceable." NuVasive, Inc. v. Day, 954 F.3d 439, 444 (1st Cir. 2020). The act exempts several subsets of employees from enforceable noncompetition agreements, provides "stronger substantive and procedural protections" to employees subject to such agreements, and "limit[s] employers to substantially reduced post-employment restrictions" (quotations and citation omitted). DraftKings Inc. v. Hermalyn, 118 F.4th 416, 421 (1st Cir. 2024). However, "to protect . applicable legitimate business interests," the act also grants a Superior Court judge the discretion to "reform or otherwise revise" offending language in a noncompetition agreement in order "to render it valid and enforceable to the extent necessary." G. L. c. 149, § 24L (d).

The act defines a "noncompetition agreement" as an agreement between an employer and (current or prospective) employee that prohibits the employee from engaging in specified competitive activities after the employment relationship has ended. G. L. c. 149, § 24L (a). A "forfeiture for competition agreement" is one that imposes financial consequences on a former employee for engaging in competitive activities. Id. The act expressly includes forfeiture for competition agreements within the definition of noncompetition agreements, but excludes "covenants not to solicit or hire employees of the employer." Id. See Automile Holdings, LLC v. McGovern, 483 Mass. 797, 807 n.15, 136 N.E.3d 1207

(2020) ("By its terms, the [act] does not apply to nonsolicitation agreements or agreements made in connection with the sale of a business").

On appeal, the parties dispute whether a nonsolicitation agreement, although expressly excluded from the statutory definition of a "noncompetition agreement," may nevertheless constitute a "forfeiture for competition agreement" under the act when its violation triggers a forfeiture clause. FMI argues that the Legislature's exclusion of nonsolicitation agreements from the definition of noncompetition agreements reflects an intent to similarly exclude them from the definition of forfeiture for competition agreements. Accordingly, FMI contends that a nonsolicitation provision paired with a forfeiture clause, as in this case, falls outside the scope of the act. Miele disagrees, maintaining that her alleged solicitation constitutes a "competitive activit[y]" within the meaning of the statutory definition of a forfeiture for competition agreement.[3]

1. Standard of review. We review a decision granting or denying a motion for judgment on the pleadings de novo. Hovagimian v. Concert Blue Hill, LLC, 488 Mass. 237, 240, 172 N.E.3d 728 (2021). In doing so, we accept all facts pleaded by the nonmoving party as true and draw every reasonable inference in that party's favor to determine whether the factual allegations plausibly suggest an entitlement to relief. Barron v. Kolenda, 491 Mass. 408, 415, 203 N.E.3d 1125 (2023). Questions of statutory interpretation are likewise reviewed de novo. Hovagimian, supra.

2. Analysis. In interpreting legislative intent, we begin with the statute's plain language. Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd., 483 Mass. 600, 604, 135 N.E.3d 702 (2019). Under the plain language of the Massachusetts Noncompetition Agreement Act, (1) noncompetition agreements do not include nonsolicitation agreements, and (2) forfeiture for competition agreements are a subset of noncompetition agreements. G. L. c. 149, § 24L (a) ("Noncompetition agreements include forfeiture for competition agreements, but do not include . covenants not to solicit or hire employees of the employer ."). See Automile Holdings, LLC, 483 Mass. at 807 n.15, 136 N.E.3d 1207. It follows, by necessary implication, that forfeiture for competition agreements also exclude nonsolicitation agreements.[4] To conclude otherwise would contradict the statute's express exclusion of nonsolicitation agreements from the broader category of noncompetition agreements.

Although the agreement here involves a nonsolicitation provision coupled with a forfeiture clause, the inclusion of the latter does not alter this analysis. That is, there is no justification for treating a nonsolicitation covenant differently simply because it includes a forfeiture mechanism. Cheney v. Automatic Sprinkler Corp. of Am., 377 Mass. 141, 147 n.7, 385 N.E.2d 961 (1979) ("We . see no reason to treat differently a forfeiture for competition clause").[5] A nonsolicitation covenant remains just that -- regardless of whether the remedy for breach involves forfeiture of benefits. Because the act expressly

excludes nonsolicitation covenants, and the forfeiture at issue is triggered solely by breach of such a covenant, the act does not apply.[6]

Miele argues that the term "competitive activities" in the definition of forfeiture for competition agreement is broader than the phrase "certain specified activities competitive with" in the definition of noncompetition agreement, emphasizing the absence of the qualifying phrase "certain specified."[7] Compare G. L. c. 149, § 24L (a) (defining noncompetition agreement as one restricting "certain specified activities competitive with" employer [emphasis added]), with id. (defining forfeiture for competition agreement as one imposing financial consequences if employee "engages in competitive activities" [emphasis added]). She contends that, even if solicitation is excluded from the former, it may still fall within the broader scope of the latter.

This argument fails. Although the statute does not define the terms "competitive" or "activities," it is a well-settled principle that statutory terms used more than once should be given a consistent meaning throughout. Williams v. Board of Appeals of Norwell, 490 Mass. 684, 694, 194 N.E.3d 168 (2022). See Boston Police Patrolmen's Ass'n v. Police Dep't of Boston, 446 Mass. 46, 50, 841 N.E.2d 1229 (2006) (words of statute "should be read as a whole to produce an internal consistency" [citation omitted]). Thus, absent contrary context, the terms "competitive" and "activities" in both definitions must be construed consistently.[8]

"Although clear statutory language ordinarily obviates the need to resort to rules of interpretation, . legislative history may be referenced by way of supplementary confirmation of the intent reflected in the words used" (citation omitted). Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818, 822 n.7, 702 N.E.2d 47 (1998). As discussed in the amicus brief submitted by Russell Beck, the act "was shaped" in part by concerns espoused in Cheney, 377 Mass. 141, 385 N.E.2d 961. In Cheney, the court cautioned that, if restrictions on covenants not to compete were not also applicable to forfeiture for competition clauses, employers might circumvent such restrictions by using the latter instead of the former. Id. at 147 n.7, 385 N.E.2d 961. Thus, any reform to the law governing the enforceability of noncompetition agreements would have to account for such a possibility -- and the act did just that. Specifically, to address this concern, the Legislature explicitly defined noncompetition agreements to include such forfeiture provisions. As a result, every forfeiture for competition agreement falls within the act's definition of a noncompetition agreement, and its scope is necessarily limited by the broader statutory definition. Accordingly, because a "noncompetition agreement" under the act applies only to "activities competitive with" the employer, the term "competitive activities" within the definition of a forfeiture for competition agreement must be construed as coextensive with -- or narrower than -- the scope of "activities competitive with" the employer.

While the precise role of the phrase "certain specified" may remain open to interpretation, we need not resolve that issue here. The critical flaw in Miele's position is that her reading would expand the scope of forfeiture for competition agreements to include nonsolicitation provisions -– despite the statute's clear exclusion of such provisions from the definition of noncompetition agreements. Because forfeiture for competition agreements are expressly defined as a subset of noncompetition agreements, and nonsolicitation agreements are explicitly excluded from that category, solicitation cannot be reintroduced through the back door of "competitive activities" without rendering the statute internally contradictory.

Accordingly, we answer the reported question in the negative: a forfeiture clause triggered by a breach of a nonsolicitation agreement does not constitute a "forfeiture for competition agreement" subject to the act. We remand the matter to the Superior Court with instructions to reverse the order partially granting Miele's motion for judgment on the pleadings.[9]

So ordered.

FOOTNOTES

1. A Superior Court judge reported the question to the Appeals Court pursuant to Mass. R. Civ. P. 64 (a), as amended, 423 Mass. 1403 (1996).

2. We acknowledge the amicus briefs submitted in support of the defendant by the Massachusetts Defense Lawyers Association, Inc., the New England Legal Foundation, and Russell Beck.

3. The parties raise two additional issues on appeal: (1) whether the act applies to a nonsolicitation covenant specifically contained in a separation agreement that includes a forfeiture clause triggered by a breach of that covenant, and (2) whether, assuming the act does apply, the Superior Court judge erred by failing to assess whether the agreement satisfies the act's "minimum requirements." Because the plain language of the act excludes nonsolicitation provisions from its scope, we need not reach these questions.

4. In his order, the Superior Court judge observed that "[t]he Legislature could easily have incorporated" the same exclusion of nonsolicitation covenants in the definition of "forfeiture for competition agreements" as it did in the definition of "noncompetition agreements," but "chose not to do so." This reasoning overlooks that a forfeiture for competition agreement is a type of noncompetition agreement. Including a second exclusion would have been redundant. See Boston Police Patrolmen's Ass'n v. Police Dep't of Boston, 446 Mass. 46, 50, 841 N.E.2d 1229 (2006) (courts interpret statutes to avoid rendering any part inoperative or superfluous).

5. Although the quoted language from Cheney, 377 Mass. at 147 n.7, 385 N.E.2d 961, addressed forfeiture for competition clauses in the context of covenants not to compete, the "same principles" apply equally to both noncompetition and nonsolicitation provisions (citation omitted). Automile Holdings, LLC, 483 Mass. at 808, 136 N.E.3d 1207.

6. Miele's extended discussion of case law comparing noncompetition agreements and nonsolicitation agreements is unpersuasive, as none of the cases cited addresses the specific statutory language at issue. We likewise reject her argument that the act should be construed under the "rule of lenity," which she claims requires this court to interpret the statute in favor of employees, whom the act is intended to protect. The "rule of lenity" is a canon of statutory interpretation traditionally reserved for criminal statutes, instructing courts to resolve ambiguity in favor of defendants. Charles C. v. Commonwealth, 415 Mass. 58, 70, 612 N.E.2d 229 (1993). It has no application here because the statute is both civil and unambiguous. Curtatone v. Barstool Sports, Inc., 487 Mass. 655, 658, 169 N.E.3d 480 (2021) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent" [citation omitted]).

7. FMI contends that the phrase "certain specified" merely requires an employer to identify which "competitive activities" are prohibited posttermination, and does not suggest that the scope of activities in that definition is narrower than the broader definition.

8. For this reason, another of Miele's arguments is readily dismissed. She contends that the use of the plural term "activities" in the definition of a forfeiture for competition agreement suggests an expansive interpretation that encompasses solicitation. But the term "activities" also appears in the plural in the definition of a noncompetition agreement -- despite the statute's express exclusion of nonsolicitation agreements from that category. See G. L. c. 149, § 24L (a).

9. FMI's request for costs on appeal pursuant to Mass. R. A. P. 26 (a), as appearing in 481 Mass. 1655 (2019), is denied.

GEORGES, J.