IN THE COURT OF APPEALS OF IOWA

No. 8-1042 / 08-0677
Filed March 26, 2009

HAND CUT STEAKS ACQUISITIONS, INC., an Arkansas Corporation,
Plaintiff-Appellant,

vs.

FOUNTAIN THREE, an Iowa General Partnership, BRINKER, IOWA, INC., a Delaware Corporation, BRINKER INTERNATIONAL, INC., d/b/a ROMANO'S MACARONI GRILL, a Delaware Corporation, B.W.C. FARMS, INC., an Iowa Corporation, ROCK BOTTOM RESTAURANTS, INC., a Delaware Corporation, CHK, L.L.C., a California limited liability company, and BARNES & NOBLE BOOKSELLERS, INC., d/b/a BARNES & NOBLE BOOKSELLER, a Delaware Corporation,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

Hand Cut Steak Acquisitions, Inc. appeals from the district court's final judgment entry and previous grant of summary judgment. **AFFIRMED.**

David L. Welch and Donald J. Kleine of Pansing, Hogan, Ernst & Bachman, L.L.P., Omaha, and Frederick Harris of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellant.

Bradley M. Beaman and Denny M. Dennis of Bradshaw Law Firm, Des Moines, for appellee Barnes & Noble Booksellers, Inc.

Patrick J. McNulty and Adam D. Zenor of Grefe & Sidney, P.L.C., Des Moines, for appellees Brinker Iowa, Inc. and Brinker International, Inc.

Lorraine J. May of Hopkins & Huebner, P.C., Des Moines, for appellee Fountain Three.

B.W.C. Farms, Inc., through its registered agent, David E. Carpenter, West Liberty, pro se.

CHK, L.L.C., West Des Moines, pro se.

Heard by Mahan, P.J., and Miller and Doyle, JJ.

MAHAN, P.J.

Hand Cut Steak Acquisitions, Inc. (HCS) appeals from the district court's final judgment entry and previous grant of summary judgment on HCS's petition for declaratory judgment on the issue of whether a covenant bars the operation of an Old Chicago restaurant on HCS's site in The Shoppes at Three Fountain.[1] We affirm.

I. Background Facts and Proceedings.

The covenant at issue (Applicable Covenant), filed in 1996, applies to the commercial property in the real estate development known as The Shoppes at Three Fountains (The Shoppes) in West Des Moines. Brinker Iowa, Inc. owns a site at The Shoppes, where it operates a Romano's Macaroni Grill (Romano's).[2] DF&R Operating Company, Inc. owned a site at The Shoppes from 1998 to 2003, where it operated a Don Pablo's Mexican Restaurant. In 2003 HCS purchased DF&R's site at The Shoppes, with knowledge that the site was subject to the Applicable Covenant. The Applicable Covenant states as follows:

> DF&R or its successors and assigns shall not use the DF&R parcel as an Italian restaurant, a microbrewery, a bookstore selling books, books on tape, magazines, or periodicals as its principal business, or in any other use that is in competition with the Romano's Macaroni Grill or Rock Bottom Restaurant and Brewery that are currently operating at The Shoppes at Three Fountains or the proposed Barnes & Noble Bookstore to be located at The Shoppes at Three Fountains, or for any use that would be deemed illegal,

[1] Defendants B.W.C. Farms, Inc. and Rock Bottom Restaurants, Inc. have not actively participated in the litigation of this matter. However, in its final judgment, the district court noted that by virtue of the court's ruling on HCS's motion for summary judgment and the subsequent filings by the parties, only HCS, and defendants Brinker International, Inc., and Brinker Iowa, Inc. remained as litigants in this case. In its final judgment entry, the court dismissed HCS's claims against those remaining defendants.

[2] Throughout this opinion, Romano's, Brinker International, Inc., and Brinker Iowa, Inc. are referred to as one and the same.

> obnoxious, or a nuisance. Developers shall not allow the use of the remaining property within The Shoppes at Three Fountains to be used in a manner in competition with DF&R's use of the site as a Mexican restaurant.

Don Pablo's soon left HCS's site at The Shoppes. HCS then operated a Colton's Steakhouse and Grill on the site from 2003 to 2005, when it closed due to lack of business. HCS's site has been vacant since that time, incurring approximately $280,000 in costs annually. HCS eventually negotiated to bring an Old Chicago restaurant to the site. Negotiations stalled, however, when Old Chicago raised concerns about the Applicable Covenant and HCS refused to indemnify Old Chicago against any possible claims brought under the Applicable Covenant. Thereafter, HCS filed a petition for a declaratory judgment on the issue of whether the Applicable Covenant bars the operation of an Old Chicago restaurant on HCS's site in The Shoppes, stating two causes of action: (1) the Applicable Covenant is vague, ambiguous, and constitutes an unlawful restriction on HCS's free use of its property and (2) that Old Chicago is not an "Italian restaurant" nor is it "in competition with the Romano's Macaroni Grill" located at The Shoppes.[3]

The district court granted summary judgment in favor of the defendants with regard to the first issue, finding the Applicable Covenant is not vague, ambiguous, or unlawfully restrictive on HCS's free use of its property.[4] With regard to the second issue, after a two-day bench trial, the court entered a

[3] HCS also filed a motion for summary judgment on these claims.

[4] The court had previously denied HCS's motion for summary judgment with regard to this issue, finding that, as a matter of law, "the language used in the applicable covenant is not overbroad nor vague." The court thereafter incorporated that ruling into its decision granting the defendants' motion for summary judgment on the issue.

judgment finding Old Chicago is an Italian restaurant, but even if it were not, it would be in competition with Romano's if it were located at The Shoppes. HCS now appeals.

II. Standard of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.4; *Wallace v. Des Moines Indep. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008). Summary judgment is available only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). An issue of material fact occurs when the dispute involves facts that might affect the outcome of the suit under the applicable law. *Wallace*, 754 N.W.2d at 857. Such issue is "genuine" when the evidence allows a reasonable jury to return a verdict for the nonmoving party. *Id*. The burden of showing the nonexistence of a material fact is on the moving party, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. *Id.*; *Rodda v. Vermeer Mfg*., 734 N.W.2d 480, 483 (Iowa 2007).

Our review of a declaratory judgment action tried at law is for corrections of errors at law. *American Family Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571, 575 (Iowa 2004). We are bound by well-supported findings of fact, but are not bound by the legal conclusions of the district court. *Id*. We review the court's interpretation of a contract as a legal issue unless it depended on extrinsic evidence. *Pillsbury Co., Inc. v. Wells Dairy, Inc*., 752 N.W.2d 430, 435-36 (Iowa

2008). When the court is required to construe a contract, it decides the legal effect of the agreement. *Id*. Construction is always reviewed as an issue of law. *Id*.

The district court did not deem it necessary to consider extrinsic evidence in determining the meaning of the restrictive covenant in this case. Therefore, our review of the district court's interpretation of the contract is at law. *Id*. Where the facts are not in dispute, appellate review in a declaratory judgment action is to determine whether the district court correctly determined the legal consequences arising from a contract. *Shelter Gen. Ins. Co. v. Lincoln*, 590 N.W.2d 726, 728 (Iowa 1999).

III. Merits.

Iowa law recognizes restrictive covenants. *Stone Hill Cmty. Ass'n v. Norpel*, 492 N.W.2d 409, 410 (Iowa 1992). Restrictive covenants are contracts under which "the lot owners promise each other to use their lots in conformity with the restrictions." *Compiano v. Kuntz*, 226 N.W.2d 245, 248 (Iowa 1975); *see Fjords North, Inc. v. Hahn*, 710 N.W.2d 731, 735 (Iowa 2006). Such covenants may contain language barring "any" competition amongst those agreeing to the covenant. *Uptown Food Store, Inc. v. Ginsberg*, 255 Iowa 462, 469-70, 123 N.W.2d 59, 63-64 (1963).

In this case, HCS knew about and agreed to the Applicable Covenant when it purchased its site in The Shoppes. HCS operated a Don Pablo's Mexican restaurant and a Colton's Steakhouse on the property without a problem under the Applicable Covenant. Furthermore, HCS was familiar with covenants

similar to the Applicable Covenant and used them in their own business practices. As Patrick Boyd, the owner of HCS, testified:

> Q. [Defense counsel] Please tell the Court whether or not in your professional experience you or your companies have utilized use restrictions that would prevent competitors from operating a restaurant which you would deem to be in competition with yours. A. [Boyd] We use the exclusives. Typically, they are set out in percentage of menu mix where it says a direct competitor.
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> Q. You use the word "exclusive," sir. What do you mean by exclusives? A. Well, exclusive use.
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> Q. Exclusive means what, sir? A. Well, if you were in a center, no other properties could come in that were in competition with you.

We agree with the district court that the Applicable Covenant is not vague, ambiguous, or unlawfully restrictive on HCS's free use of its property. As the court stated:

> In the present case, the restrictive covenant uses clear, unambiguous language. The HCS parcel is not to be used by an Italian restaurant or one that would be in competition with Romano's Macaroni Grill, Rock Bottom, and Barnes & Noble. Likewise, no other parcels in The Shoppes at Three Fountains are to be used by a Mexican restaurant. Both Don Pablo's Mexican restaurant and its successor Colton's Steakhouse occupied the HCS parcel without infringing upon the Applicable Covenant.

Although HCS presented credible evidence with regard to Old Chicago's "décor" and "concept," it did not rebut defendants' detailed testimony with regard to sales mix and financial comparisons. We agree that although the restaurants' design and concept may differ, the issues before the court are (1) whether Old Chicago is an Italian restaurant and (2) whether it is in competition with Romano's. Close to sixty percent of Romano's sales are from Romano's core menu items. These core menu items include pasta, classical Italian (lasagnas, alfredos, spaghetti and meatballs, parmesans, marsalas, scaloppini), salad add-

ons, features, and brick-oven pizzas. This large percentage of Romano's sales would be impacted by a twenty-five percent overlap of specific menu items with Old Chicago. We agree with the court's finding that Old Chicago is an Italian restaurant, but even if it were not, that it would be in competition with Romano's. As the court determined:

> It is clear from the evidence that an Old Chicago restaurant is an Italian casual dining restaurant. Its very logo entices people to that conclusion by emphasizing pasta and pizza. While pizza arguably may or may not itself be Italian, its flavors are derived from Italian ingredients such as tomato sauce, pepperoni, mozzarella cheese and the like. While an Old Chicago restaurant has an extensive bar emphasis, the unrefuted evidence is that over 70% of Old Chicago's sales are derived from food and nonalcoholic beverages, and 46% of its menu items are Italian as noted in the Mintel analysis.
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> Based upon the evidence presented, the Court concludes that an Old Chicago restaurant is an Italian restaurant.
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> Even if the Court were to find that an Old Chicago restaurant is not an Italian restaurant, it is clear from the evidence that an Old Chicago restaurant located in the HCS Property would be in competition with Romano's Macaroni Grill, notwithstanding the fact than an Old Chicago's bar business caters to a younger age group.
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> The competition between an Old Chicago restaurant located on the HCS Property and Romano's would obviously be even more acute due to their close proximity to each other, a mere 300 to 400 feet away from each other in the same commercial center. This is exactly what the Applicable Covenant was designed to protect and what the parties agreed to when they purchased their commercial sites, either as original purchasers or as successors. HCS knew of the restriction when it purchased the subject property. As it stands, an Old Chicago restaurant located on the HCS Property would be in competition with Romano's Macaroni Grill and be in violation of the Applicable Covenant.

We have thoroughly reviewed the briefs and the record in this case and find no error. The district court's ruling on plaintiff's motion for summary

judgment, its ruling on defendants' motion for summary judgment, and its final judgment entry are well reasoned and fully supported by the record. We affirm.

AFFIRMED.