UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10814
No. 94-11050

BYRON R. BRYSON,

Plaintiff-Counter Defendant-Appellee,

VERSUS

INS INVESTIGATIONS BUREAU, INC.

Defendant-Counter Plaintiff-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:94 CV 250 R)

August 14, 1995

Before DAVIS and JONES, Circuit Judges, and HINOJOSA[1], District Judge.

PER CURIAM:[2]

The Texas Supreme Court's decision in DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990), cert. denied, 498 U.S. 1048

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[1]District Judge of the Southern District of Texas, sitting by designation.

[2]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

(1991), is indistinguishable from this case and controls the outcome of this appeal with respect to the enforceability of the noncompete agreement contained in the employment contract.[3] When we apply DeSantis to the summary judgment evidence properly before the district court,[4] we conclude that the court correctly granted declaratory relief to Bryson, declaring the noncompete agreement unenforceable as a matter of law. It follows that the district court correctly dismissed INS' counterclaims seeking injunctive relief and damages predicated on the noncompete agreement and correctly awarded fees and costs to Bryson. See Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (entitling prevailing party in declaratory judgment action to recovery of attorneys' fees); see also Flint & Assocs. v. Intercontinental Pipe & Steel, Inc., 739 S.W.2d 622, 624 (Tex. App.--Dallas 1987, writ denied) (awarding attorneys' fees

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[3]By "noncompete agreement," we mean Section 15 of the agreement which restricts Bryson from engaging in fire investigation services and from soliciting INS clients for such services for six months after termination within 150 miles of Bryson's domicile. We reject INS' argument on appeal that the nonsolicitation portion of this section is separable from the noncompetition portion, and thus not subject to the same requirements. Even if this were true, INS has waived this argument because throughout the proceedings below both parties and the court referred to Section 15 in its entirety as the noncompete agreement.

[4]We only consider evidence filed in the record and brought to the district court's attention. See Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.) ("[T]he non-movant must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue . . . ."), cert. denied, 115 S. Ct. 195 (1994). INS bases much of its argument on appeal on testimony given in the preliminary injunction hearing. It did not refer to that testimony in its brief to the district court. Although its response brief was filed on the day of the hearing, there is no indication in the record that INS attempted to supplement the motion with cites to the hearing or to request that the district court reconsider the motion on the basis of this new evidence.

attributable to all claims arising out of same transaction and so interrelated to declaratory judgment claim as to entail proof and denial of essentially the same facts). We therefore affirm these features of the district court's judgment.

Because Bryson's motion for summary judgment did not address the enforceability of the nondisclosure of prior employment clause, the nondisclosure of business information clause, or the nonsolicitation clause (Section Ten of the contract), and neither the magistrate judge nor the district court addressed INS' counterclaims predicated on these covenants, we vacate that part of the judgment dismissing INS' counterclaims based on these clauses and remand for further proceedings. See Zep Mfg. v. Harthcock, 824 S.W.2d 654, 663 (Tex. App.--Dallas 1992) (distinguishing nondisclosure clauses from noncompete clauses).

AFFIRMED in part; VACATED and REMANDED in part.