NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1360

SOUTHERN AGGREGATES, LLC

VERSUS

MARCUS C. DYESS

Judgment Rendered: JUN 05 2015

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On Appeal from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Trial Court No. 143,315

The Honorable Brenda Bedsole Ricks, Judge Presiding

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Phyllis G. Cancienne
Christopher G. Morris
M. Levy Leatherman
Baton Rouge, Louisiana
and
Andre G. Coudrain
Hammond, Louisiana

Attorneys for Appellant,
Southern Aggregates, LLC

H. Alston Johnson
Michael D. Hunt
Susan W. Furr
Baton Rouge, Louisiana
and
Christopher M. Moody
Hammond, Louisiana

Attorneys for Appellee,
Marcus C. Dyess

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

Guidry, J. concurs in the result.

DRAKE, J.

The plaintiff, Southern Aggregates, LLC (Southern Aggregates), appeals a judgment of the trial court granting the exception raising the objection of no cause of action in favor of defendant, Marcus C. Dyess. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Southern Aggregates, a sand and gravel mining business, originally sought injunctive relief and damages against Mr. Dyess for violation of an employment agreement, which was signed on August 4, 2008. Prior to August 4, 2008, Mr. Dyess was a general manager and held an ownership interest in Former Southern Aggregates, LLC, a **Louisiana** limited liability company (Former Southern Aggregates). On August 4, 2008, Southern Aggregates, a **Delaware** limited liability company, entered into an agreement whereby Southern Aggregates purchased substantially all of the assets of Former Southern Aggregates. In connection with the sale, Mr. Dyess entered into an employment agreement with Southern Aggregates, which included a non-compete provision (Section 7) and a right of first refusal (Section 2). The non-compete provision contained a two-year limitation and was limited to the geographical area of eighteen listed parishes in Louisiana. The right of first refusal provision contained a five-year term and was limited to the same geographical area as the non-compete provision.

Mr. Dyess left his employment with Southern Aggregates on February 8, 2010. Southern Aggregates claimed in its petition that Mr. Dyess violated the employment agreement, either personally, through his son, or through a representative, by leasing property in Livingston Parish, one of the parishes listed in the geographical area of the employment agreement, for mining purposes. After a hearing on December 10, 2013, the district court denied the motion by Southern Aggregates for a preliminary injunction. Thereafter, Mr. Dyess filed an exception

raising the objection of no cause of action. Following a hearing on the exception, the district court signed a judgment on May 21, 2014, sustaining the exception and dismissing Southern Aggregates' claims with prejudice. Southern Aggregates now appeals from this judgment.

STANDARD OF REVIEW

The function of the peremptory exception raising the objection of no cause of action is to test the legal sufficiency of a pleading by determining whether the law affords a remedy on the facts alleged in the pleading. *Morris v. Bulldog BR, LLC,* 13-1861 (La. App. 1 Cir. 6/6/14), 147 So. 3d 1122, 1123, *writ denied,* 14-1453 (La. 10/10/14), 151 So. 3d 585. The exception is triable on the face of the pleadings, and, for the purpose of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Id.* The burden of demonstrating that a petition fails to state a cause of action is upon the mover. *Id.* In reviewing a trial court's ruling sustaining an exception of no cause of action, appellate courts conduct a *de novo* review, because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. *Id.*

DISCUSSION

The employment agreement entered into between the parties, effective August 4, 2008, contained several paragraphs relevant to the issue before this court. Southern Aggregates claims that Mr. Dyess agreed to provide it with a right of first refusal as to any property he identified for purchase, lease, or development in certain "Restricted Louisiana Parishes" (referred to in the employment agreement as "Restricted Area Property"). Section 2, entitled "Duties and Responsibilities of the Executive," provides, in pertinent part:

> For a period of five years following the last day of the Employment Period the Executive shall notify the Company in writing (the "***Notice***") of any Restricted Area Property that he has located for

> purchase, lease or development. The Company shall notify the Executive within 7 days of its receipt of the Notice whether it is interested in purchasing, leasing or mining on the Restricted Area Property specified in the Notice. ... If the Company timely notifies the Executive of its interest in a Restricted Area Property, then the Executive shall negotiate in good faith with the Company regarding (1) the acquisition of such Restricted Area Property that the Company wishes to purchase, lease or mine and (2) the compensation to the Executive with respect to such Restricted Area Property which shall be not less than the Commission the Executive would have received if such transaction between the Executive and the Company would have been completed during the Employment Term. If the Company and the Executive cannot come to an agreement regarding the acquisition of a Restricted Area Property and the compensation payable to the Executive with respect to such Restricted Area Property within 14 days of the Company's receipt of the Notice, then the Executive shall have no further obligation to negotiate with the Company regarding such Restricted Area Property.

In addition, the employment agreement contains Section 7, entitled "Agreement Not to Compete," which provides, in pertinent part:

> (a) Non-Compete Period. The ***"Non-Compete Period"*** shall begin on the Effective Date and shall terminate on the latest of the date twenty-four (24) months following the Termination Date.
>
> (b) Prohibited Executive Activities. Other than as set forth in Section 2 of this Agreement, the Executive shall not, during the Non-Compete period within the Restricted Area ... own, manage, operate, control or participate in the ownership, management, operations or control of, or have any interest, ... in...any business engaged in operating any crushed stone quarry, sand and gravel operation, or any other activity which directly or indirectly competes with the Business (as defined in the Purchase Agreement).

Southern Aggregates claims that Mr. Dyess breached the contractual and legal obligations he owed by identifying, testing, and mining properties without first notifying Southern Aggregates in accordance with the right of first refusal contained in the employment agreement. Mr. Dyess filed a perepmtory exception raising the objection of no cause of action claiming that the right of first refusal was null and void pursuant to La. R.S. 23:921, which provides, in pertinent part:

> A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. However, every contract or agreement, or provision thereof,

> which meets the exceptions as provided in this Section, shall be enforceable.

Louisiana Revised Statute 23:921 contains very limited exceptions to its general rule, of which only two are applicable to the present situation: La. R.S. 23:921(B) (noncompetition agreement in the case of the sale of good will of a business); and La. R.S. 23:921(C) (noncompetition agreement in the case of an employee/employer relationship). Both of these exceptions apply only if the contractual provision at issue does not exceed a period of two years from date of the sale of a business or from the date of the last work performed under the written contract. La. R.S. 23:921(B) and (C).

Southern Aggregates argued at the district court and before this court that because the right of first refusal, Section 2, contemplated compensation for Mr. Dyess, it is a separate and distinct provision from the noncompetition section, Section 7. Southern Aggregates specifically states in its brief, "Indeed, the [right of first refusal] does not even require [Mr. Dyess] to agree to allow Southern Aggregates to acquire any of the properties he brings to its attention – it merely obligates him to negotiate with Southern Aggregates for a potential acquisition." In advancing this argument, Southern Aggregates claims that the district court failed to properly apply the holding of this court in *Smith v. Applied Concepts,* 08-2138 (La. App. 1 Cir. 6/17/09), 2009 WL 2486885 (unpublished), where the parties entered into an agreement that the defendant would pay the plaintiff a $2,500 monthly fee not to enter any employment positions in the bingo industry. There was no time limit placed on the agreement, and the defendant paid the plaintiff the monthly fee until after Hurricane Katrina, when the defendant reduced the monthly payment and ultimately ceased the payment. The plaintiff sued to enforce the agreement, and the trial court granted defendant's motion for summary judgment after finding that the agreement was an unenforceable

noncompetition agreement. On appeal, this court noted the longstanding public policy disfavoring noncompetition agreements. *Id.* at * 2. This court cited *SWAT 24 Shreveport Bossier, Inc. v. Bond,* 00-1695 (La. 6/29/01), 808 So. 2d 294, 298 where the court stated that the policy is based upon an underlying state desire to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden. In *Smith,* this court distinguished the agreement at issue from a noncompetition agreement. The agreement Smith signed paid him per month and did so for at least six years. *Smith,* 08-2138 at * 2. Therefore, this court found that Smith did not contractually deprive himself of the ability to support himself, and more importantly, the provisions of the agreement did not prohibit Smith from competing with the defendant but terminated if Smith did so. *Id.*

The present employment agreement is distinguishable from the agreement in *Smith*, as Mr. Dyess is not paid to refrain from competing with Southern Aggregates. Southern Aggregates argues that because its employment agreement provides compensation to Mr. Dyess, *Smith* applies. The duties and responsibilities provision in the employment agreement requires Mr. Dyess to notify Southern Aggregates of any "Restricted Area Property that he has located for purchase, lease or development." Southern Aggregates is then permitted to decide if it is interested in purchasing, leasing or mining the Restricted Area Property. If Southern Aggregates decides to purchase, lease or develop the Restricted Area Property, Mr. Dyess is supposed to be paid not less than the commission he would have made while working for Southern Aggregates. However, the employment agreement anticipates that there could be disagreement regarding the compensation to Mr. Dyess and provides that if the parties cannot agree within fourteen days as to the acquisition of the Restricted Area Property or

as to the compensation due Mr. Dyess, he "shall have no further obligation to negotiate with the Company regarding such Restricted Area Property."

We agree with the finding of the district court that the right of first refusal, Section 2, is an unenforceable non-competition agreement that is not similar to the agreement in *Smith,* which actually compensated Mr. Smith monthly for not competing in the bingo industry. In the present case, Mr. Dyess may never be compensated under the employment agreement for not competing with Southern Aggregates. Every piece of Restricted Area Property he located for "purchase, lease or development" would have to be brought to the attention of Southern Aggregates, which then could decide whether to acquire that property. The employment agreement places the burden on Mr. Dyess to negotiate his compensation; he is not automatically paid by Southern Aggregates. In other words, Mr. Dyess can only engage in the locating and mining business if he gives Southern Aggregates an exclusive right of first refusal to take advantage of the work and industry of Mr. Dyess and only if Southern Aggregates then declines to exercise that right. If Southern Aggregates chooses to exercise the right of first refusal on each occasion that Mr. Dyess locates Restricted Area Property, Mr. Dyess may never locate property for himself for a period of five years. Furthermore, the purported compensation to Mr. Dyess in the employment agreement is contingent on the action of Southern Aggregates and negotiable rather than an unequivocal certain payment as in *Smith.*

Section 2 also prohibits Mr. Dyess from competing with Southern Aggregates for a period of five years. Despite the title given Section 2 in the employment agreement, its effect is to restrain Mr. Dyess from competing in the same business as Southern Aggregates for five years from the dates of his termination, which violates La. R.S. 23:921.

Louisiana has had a strong public policy disfavoring non-competition agreements between employers and employees. *Vartech Systems, Inc. v. Hayden,* 05-2499 (La. App. 1 Cir. 12/20/06), 951 So. 2d 247, 254 (citing *SWAT 24*, 808 So. 2d at 298). This public policy is expressed in La. R.S. 23:921(A)(1). Louisiana's strong public policy restricting non-competition agreements is based on an underlying state desire to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden. *SWAT 24*, 808 So. 2d at 298 (citing *McAlpine v. McAlpine,* 94-1594 (La. 9/5/96), 679 So. 2d 85, 91). In order to be valid, a noncompetition agreement must strictly comply with the requirements of La. R.S. 23:921. *Lafourche Speech & Language Services, Inc. v. Juckett,* 94-1809 (La. App. 1 Cir. 3/3/95), 652 So. 2d 679, 680, *writ denied,* 95-0850 (La. 5/12/95), 654 So. 2d 351. Because such agreements are in derogation of the common right, they must be strictly construed against the party seeking their enforcement. *Vartech,* 951 So. 2d at 254 (citing *SWAT 24,* 808 So. 2d at 298).

The right of first refusal contained in Section 2 restricts Mr. Dyess from "exercising a lawful profession, trade or business." La. R.S. 23:921(A)(1). The effect of the provision is that Mr. Dyess must give notice to his former employer, Southern Aggregates, of all future business opportunities in the sand and gravel trade. Southern Aggregates then has the opportunity to take the business from Mr. Dyess and has the ability to negotiate the amount paid to him, which differs from the agreement providing for an unequivocal, definite payment found in *Smith*[1]. Therefore, this court finds *Smith* distinguishable from the present facts.

[1] Southern Aggregates claims that it paid the health insurance of Mr. Dyess from the date of his termination, which it asserts qualifies as payment to Mr. Dyess. This court declines to extend the holding of *Smith* to include that paying health insurance benefits alleviates the public policy concern against an individual contractually depriving himself of the ability to support himself. *See SWAT 24,* 808 So. 2d at 298.

Furthermore, we disagree with Southern Aggregates' argument that the district court erred in its interpretation of the employment agreement by failing to give meaning to all the terms of the employment agreement, mainly that the right of first refusal is separate and distinct from the noncompetition clause. The interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. The words of a contract must be given their generally prevailing meaning. La. C.C. art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. La. C.C. art. 2048. The use of extrinsic evidence is proper only when a contract is found to be ambiguous after an examination of the four corners of the agreement. *James Construction Group, L.L.C. v. State ex rel. Department of Transportation and Development,* 07-0225 (La. App. 1 Cir. 11/2/07), 977 So. 2d 989, 993.

Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. La. C.C. art. 2050. Further, courts should not strain to find an ambiguity where none exists. Finally, whether a contract is ambiguous is a question of law. In addressing this legal issue, a reviewing court conducts a *de novo* review and renders a judgment on the record. *James Construction Group, L.L.C,* 977 So. 2d at 993. Finally, in case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished the text. La. C.C. art. 2056.

This court notes that the noncompetition clause, Section 7, references the right of first refusal in Section 2 by stating, "Other than as set forth in Section 2 of this Agreement... ." Therefore, the employment agreement treats both Section 2

and Section 7 as a noncompetition agreement. Southern Aggregates attempts to separate Section 2 and Section 7 as distinct clauses, but Section 2 has the same effect as Section 7—Mr. Dyess is prevented from working for any other sand and gravel company because he is required to notify Southern Aggregates of all potential properties even if working for another employer. Based upon the above principles of contract interpretation and our finding that the right of first refusal has the same effect as a noncompetition clause, which in this case actually references the right of first refusal, we agree with the district court that the right of first refusal violates La. R.S. 23:921.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of the appeal are assessed to plaintiff, Southern Aggregates, LLC.

AFFIRMED.