COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP709 **Cir. Ct. No. 2004CV557**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

BRENT WOOKEY,

PLAINTIFF-APPELLANT,

V.

KAPLAN INC. D/B/A SCHWESER STUDY PROGRAM,
A KAPLAN PROFESSIONAL COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALES, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Brent Wookey appeals from a summary judgment order that dismissed his breach of contract action against his former employer,

Kaplan, Inc. For the reasons discussed below, we reverse and remand with directions to enter summary judgment in Wookey's favor.

BACKGROUND

¶2 Kaplan hired Wookey to manage its Schweser Study Program in February of 2003. Wookey signed a letter of agreement regarding his terms of employment at the time of his hire and shortly thereafter also signed a "Confidentiality and Restriction Agreement." Both documents were drafted by Kaplan.

¶3 The initial letter of agreement stated in relevant part:

> You recognize that due to the nature of your employment and relationship with Kaplan as a senior member of Schweser, you will have access to and develop confidential business information, proprietary information, and trade secrets relating to the business and operations of Kaplan Inc. and its subsidiaries or affiliates (collectively, "Kaplan"). You acknowledge that information is valuable to the business of Kaplan, and that disclosure to, or use for the benefit of, any person or entity other than Kaplan or its affiliates, would cause substantial damage to Kaplan. You further acknowledge that your duties for Kaplan clients, customers, employees, and management on behalf of Kaplan and your access to and development of those close relationships with current and potential Kaplan clients and customers, at significant cost to Kaplan, render your services special, unique and extraordinary. In recognition that this good will and these relationships are assets and extremely valuable to Kaplan, and that loss of or damage to those relationships would destroy or diminish the value of Kaplan, you agree as follows:
>
> Restriction on Post-Employment Activities. During the term of your employment and for the period of ***up to six months*** following the termination of your employment, regardless of the reason you terminate from employment (the "Restricted Period"), you agree that ***in consideration of Kaplan's agreement to continue to pay your base salary throughout the Restricted Period***, you will not engage in any of the following activities ….

> (i) you will not become employed by … any partnership, corporation or other entity which is engaged [in] a business competitive with the Schweser Study Program …; or
>
> (ii) you will not hire or employ any employee of Kaplan …; or
>
> (iii) you will not engage in any other activity to interfere with, disrupt or damage Kaplan's relations with any actual or potential client or customer or other negatively impact the business of Kaplan.

(Emphasis in original.) The confidentiality and restriction agreement further specified a number of items—such as course materials, methods of instruction, research reports, marketing programs, financial data, customer lists and computer programs—which were to be considered confidential and should not be divulged either during or after Wookey's employment.

¶4 When Wookey resigned in July of 2004, the president of the company sent him a letter stating in relevant part:

> [T]his shall serve as notice to you that Kaplan shall not exercise its option to restrict your post-employment activities by continuing your salary after July 22, 2004. Nevertheless, please be reminded that you are under a continuing obligation not to disclose confidential business information, proprietary information and trade secrets relating to the business and operations of Schweser Study Program.

Notwithstanding this purported release, Wookey notified Kaplan that he intended to comply with the restrictions on his postemployment activities as outlined in the letter of agreement. When Kaplan refused to pay him six months' salary, he filed this breach of contract action.

¶5 The parties filed cross-motions for summary judgment. The trial court granted Kaplan's motion and dismissed the action. It reasoned that by

defining the restrictive period as "up to" six months, the parties had entered an open-ended agreement that Wookey's activities could be restricted for some unspecified amount of time, but no longer than six months, contingent upon Kaplan's optional "agreement to continue to pay" Wookey's salary for that amount of time. In the trial court's view, this meant there had been no meeting of minds with regard to the length of the restrictive period, and the agreement was unenforceable. Wookey appeals.

STANDARD OF REVEIW

¶6 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24.

¶7 We construe contracts to achieve the parties' intent, giving terms their plain and ordinary meanings. ***Goldstein v. Lindner***, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. If the words of a contract convey a clear and unambiguous meaning, our analysis ends. ***Id.*** However, if the contract language could be reasonably understood in more than one way, we may examine extrinsic evidence to determine the parties' intent and will construe any ambiguous contractual terms against the drafter, particularly when there is a substantial disparity of bargaining power between the parties. ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426; ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998).

DISCUSSION

¶8 The central issue presented on this appeal is whether the letter of agreement automatically obligated Kaplan to pay Wookey six months of salary if Wookey complied with the restrictions outlined in the agreement, as Wookey claims; or whether, as Kaplan maintains, the agreement permitted Kaplan to either opt out at the time of Wookey's termination or make a unilateral decision as to the length of the restrictive period before the agreement could be enforced. Both parties point to the definition of the restrictive period as "up to six months" and Kaplan's "agreement to continue to pay [Wookey's] base salary throughout the Restricted Period" as the key phrases in the letter of agreement, although each party assigns different significance to that language.

¶9 Wookey argues that Kaplan had *already* offered consideration at the time the letter of agreement was signed, in the form of an agreement to continue to pay Wookey's base salary in consideration for Wookey's restraint from engaging in specified activities. That is, Kaplan would be obligated to continue paying Wookey's salary for as long as Wookey continued to comply with the specified restrictions. Under this interpretation, it was up to Wookey to determine how long the restrictive period would last, up to a period of six months. For instance, if Wookey had taken a job with a competitor four months after terminating his employment, Kaplan would only have had to pay him four months' salary. The apparent logic underlying this position is that the longer competitive secrets are kept, the less damage disclosure would cause.

¶10 Under Kaplan's interpretation, the letter of agreement was referring to a *future* offer of consideration in the form of an agreement to continue to pay Wookey's salary throughout the Restricted Period, which Kaplan would have the

option of making at the time of Wookey's termination. In other words, Kaplan could specify how long it wished to restrict Wookey's activities after his termination, for up to six months, but it would have to pay him for whatever time it specified. The apparent logic of this position is that Kaplan would be in the best position to determine how long a restrictive period would be necessary to protect its interests, depending in part upon how long Wookey's employment ultimately lasted.

¶11 We deem the letter of agreement to be ambiguous because it does not explain how, when, or by whom the length of the restrictive period is to be determined, and the differing interpretations offered by the parties are both reasonable. Because Kaplan drafted the agreement, we will construe the ambiguity against it. Accordingly, we hold that Kaplan did not have the authority to opt out of its agreement to continue to pay Wookey throughout the restrictive period or set the length of the restrictive period. Rather, Wookey's compliance with the specified restrictions for the maximum six-month period obligated Kaplan to pay Wookey's salary for that time.

¶12 We further conclude that, even if Kaplan could have opted out, its post-termination letter was ineffective to do so. The letter told Wookey he was "under a continuing obligation not to disclose confidential business information, proprietary information and trade secrets relating to the business and operations of Schweser Study Program." Although Kaplan claims that sentence was referring to ongoing obligations under the second Confidentiality and Restriction Agreement, rather than restricted activities under the initial letter of agreement, the phrase "confidential business information, proprietary information and trade secrets" appeared in the initial letter of agreement and fell within the scope of its paragraph (iii). More specifically, the prohibition in paragraph (iii) against engaging in any

activity that would negatively impact Kaplan's business encompassed disclosure of any confidential business information, proprietary information or trade secrets which the letter agreement purported to be trying to protect. Kaplan could not tell Wookey both that it would not pay him to restrict his activities and that he still had an obligation to restrict his activities in compliance with the third paragraph of the letter of agreement.

¶13 In sum, we conclude that the trial court erred in granting Kaplan's motion for summary judgment. We reverse and remand with directions that it enter summary judgment in Wookey's favor.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.