COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP801 **Cir. Ct. No. 2009CV17630**

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

CALEDONIA DIRECT, INC.,

PLAINTIFF-APPELLANT,

V.

JEFFREY J. FAKLER AND
AIM TRANSFER & STORAGE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Reversed and cause remanded*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Caledonia Direct, Inc. (CDI) appeals the trial court's order granting Jeffrey Fakler and AIM Transfer & Storage, Inc.'s motion

to dismiss CDI's claim that Fakler, a former CDI employee, breached the covenant not to compete that he signed on December 2, 2008.[1] CDI contends that the trial court erred in its determination that the covenant not to compete was unenforceable because it was ambiguous. We agree with CDI. When a covenant not to compete is found to be ambiguous, it is the trial court's obligation to look for extrinsic evidence to discern its meaning. Because the trial court did not do so in this case, we reverse and remand this matter to the trial court.

I. BACKGROUND.

¶2 The facts in this case derive solely from the complaint and the covenant not to compete between Fakler and CDI, which is attached to the complaint.

¶3 According to those documents, Fakler had been an employee of CDI, a company doing business as a "full-service shipping broker and carrier," since its inception in December 2008. Prior to that time, Fakler had worked for CDI's predecessor companies. Given his history with the companies, Fakler was intimately knowledgeable about customer lists, goodwill of the companies and trade names. In addition, Fakler was knowledgeable about the business practices of CDI and had "unlimited access to confidential information" about customers and orders. While working for CDI, Fakler was responsible for all freight operations.

[1] The trial court denied Fakler's and AIM Transfer & Storage, Inc.'s motion to dismiss the second (Breach of Fiduciary Duty of Loyalty), third (Aiding and Abetting Breach of Fiduciary Duty), and fourth (Tortious Interference with Contract) causes of action. We granted Caledonia Direct's petition for leave to appeal a nonfinal order.

¶4 Fakler also was the sole shareholder of a company called Cheetah Transport Inc., which contracted with CDI to perform trucking services for CDI's customers. As a result of these business arrangements, CDI paid Fakler over $200,000 in wages, consulting fees, and settlements in 2009.

¶5 When CDI formed in 2008, Fakler had expressed an interest in working for CDI under the same contractual arrangements as he had with its predecessor companies. CDI agreed to this arrangement as long as Fakler signed a covenant not to compete with CDI, applicable for a limited period of time following Fakler's resignation. Ultimately, the parties signed an agreement which prohibited Fakler, for a period of two years following his termination from the company, from doing the following: (1) competing directly or indirectly with CDI within a fifty mile radius of its headquarters; (2) being involved in the trucking business within fifty miles of CDI's headquarters; (3) soliciting CDI's former, current, or future employees to work on behalf of any CDI competitor; (4) using contracts, proprietary information, trade secrets, etc. used or useful to CDI; and (5) soliciting shippers within or outside of a fifty mile radius who were CDI customers.

¶6 On Friday, October 23, 2009, Fakler, CDI's head dispatcher, and CDI's head of the billing department simultaneously submitted their letters of resignation. Fakler then began working for a competitor—AIM Transfer & Storage. On the following Monday, a "multitude of orders from CDI canceled including all orders from its biggest customer, Technical Transportation." In addition, other customers were solicited by Fakler for his new employer.

¶7 CDI then sued both Fakler and his current employer, AIM Transfer & Storage. When filing its complaint, CDI attached a request for temporary relief

that was denied by the trial court. Rather than filing an answer to CDI's complaint, the respondents moved to dismiss the complaint on the grounds that it failed to state a cause of action upon which relief could be granted. The matter was briefed by the parties. At a hearing, the trial court ruled that the covenant not to compete was ambiguous and therefore not enforceable:

> The noncompete clause is ambiguous, it's disfavored, and I am striking it. I'm dismissing the cause of action on the noncompete…. I'm striking that cause of action because of the ambiguity… I am not willing to step in and make determinations as to what that means. It's ambiguous and therefore, is not enforceable.

¶8 Following this ruling, the trial court signed an order dismissing the first cause of action. This appeal follows.

II. ANALYSIS.

¶9 As noted, the trial court granted the respondents' motion to dismiss CDI's first cause of action concerning the covenant not to compete. A motion to dismiss questions the legal sufficiency of the plaintiff's complaint. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). The legal sufficiency of a complaint is a question of law that we review independently. ***Williams v. Security Sav. & Loan Ass'n***, 120 Wis. 2d 480, 482, 355 N.W.2d 370 (Ct. App. 1984). We must accept as true the facts alleged in the complaint when reviewing a motion to dismiss, ***Walberg v. St. Francis Home, Inc.***, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36, and dismissal is improper if there are any conditions under which the plaintiff could recover, ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 733, 275 N.W.2d 660 (1979).

¶10 Covenants not to compete such as the one being litigated here are regulated by WIS. STAT. § 103.465, entitled "restrictive covenants in employment contracts" (capitalization omitted). The statute reads:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

¶11 Restrictive covenants in Wisconsin are prima facie suspect as restraints of trade that are disfavored at law, and must withstand close scrutiny as to their reasonableness. ***Streiff v. American Fam. Mut. Ins. Co.***, 118 Wis. 2d 602, 610-11, 348 N.W.2d 505 (1984). They are not to be construed to extend beyond their proper import or further than the contract language absolutely requires. ***Id.*** at 611. Rather, they are to be construed in favor of the employee. ***Id.***

¶12 CDI argues that the trial court erred in dismissing this cause of action because, pursuant to ***Farm Credit Services of North Central Wisconsin, ACA v. Wysocki***, 2001 WI 51, 243 Wis. 2d 305, 627 N.W.2d 444, the trial court, when faced with an ambiguous covenant not to compete, is obligated to look to extrinsic evidence to discern its meaning.

> The standard rules of contract interpretation apply: the primary goal in contract interpretation is to determine and give effect to the parties' intention at the time the contract was made. When the language is unambiguous, we apply its literal meaning. *If, on the other hand, we determine that a contract provision is ambiguous, we then look to extrinsic evidence to discern its meaning.*

Id., 243 Wis. 2d 305, ¶12 (emphasis added; citations omitted).

¶13 In this case, the trial court found that the covenant was ambiguous, but did not utilize any extrinsic evidence to discern its meaning. *See* ***id.*** Instead, the trial court summarily dismissed CDI's first cause of action. We therefore agree with CDI that the trial court erred.

¶14 On appeal, Fakler urges us to interpret the trial court's comments as constituting a dismissal due to the restrictive covenant's being overly broad. Fakler also invites us to scrutinize the document and determine its validity. First, we are satisfied that the record does not support the suggestion that the trial court misspoke when it determined that the first cause of action had to be dismissed because the restrictive covenant was ambiguous. Thus, we choose to address the trial court's actual decision. Second, we decline the invitation to determine whether the covenant not to compete is enforceable in Wisconsin. This is a task better left to the trial court after it has determined the intent of the parties. *Cf.* ***Henderson v. U.S. Bank, N.A.***, 615 F. Supp. 2d 804, 814 (E.D. Wis. 2009). As a result, we reverse the order, reinstate the first cause of action, and remand the matter back to the trial court.

By the Court.—Order reversed and cause remanded.

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