STATE OF MICHIGAN

COURT OF APPEALS

BALINT/RYDER HANDLING EQUIPMENT CORPORATION,

Plaintiff-Appellant,

and

BALINT THARPE SERVICE CORPORATION,

Plaintiff,

v

JAMES R RYDER,

Defendant-Appellee.

UNPUBLISHED
July 20, 2004

No. 247302
Cass Circuit Court
LC No. 97-00522-CK

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for directed verdict. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case is on appeal for the second time. In *Balint Ryder Handling Equip Corp & Balint Tharpe Service Corp v R James Ryder,* unpublished opinion per curiam of the Court of Appeals, issued June 30, 2002 (Docket No. 218002), this Court reversed the order granting defendant's motion for summary disposition, holding that the parties had mutually modified the non-competition agreement for adequate consideration.

Jack Balint formed Balint Handling Equipment Corporation, an Indiana corporation that sells dock equipment, in January 1968 and hired defendant as a salesperson in August of the same year. Two years later, Balint transferred fifty percent of his shares to defendant and changed the corporation's name to Balint/Ryder Handling Equipment Corporation. In February 1986, plaintiff purchased defendant's interest. At that time, defendant agreed "not [to] enter into business competitive with [plaintiff]" within a specified territory for five years following the date of the agreement. Defendant continued working for plaintiff, and the parties amended their agreement, such that the five-year non-competition period would begin when defendant's employment with plaintiff ended.

Defendant left plaintiff's employ sometime in 1994, 1995, or 1996.[1] In 1996 or 1997, defendant and his wife established Dock Rite, Inc., a Michigan corporation that specializes in dock work. Plaintiff then sued defendant, alleging that defendant had breached the non-competition agreement by selling product and service competitive with plaintiff in the restricted territory. The sum total of plaintiff's evidence at trial was Balint's testimony that defendant had done "dock work" and "repair work" for two companies in the restricted territory, defendant's Dock Rite Business card, and the 1997-1999 U.S. income tax returns for Dock Rite, which established Dock Rite's gross receipt of sales over that period to be approximately $500,000. Following defendant's motion for directed verdict, plaintiff effectively moved to reopen proofs. Plaintiff sought to introduce into evidence a list of seventy-one Dock Rite clients and have Balint testify about the list. The list had been in Balint's possession since early 1999. The trial court denied plaintiff's request to reopen proofs and granted defendant's motion for directed verdict.

Because the non-competition agreement provided that Indiana law governed, we apply the substantive law of Indiana. *See Hardy v Monsanto Enviro-Chem Systems, Inc,* 414 Mich 29, 85; 323 NW2d 270 (1982); *Rubin v Gallagher*, 294 Mich 124, 127; 292 NW 584 (1940). Michigan law governs questions of procedure and remedies. *See Rubin, supra,* 294 Mich 128.

Plaintiff argues that the trial court erred in granting defendant's motion for directed verdict. We review de novo a trial court's ruling on a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court reviews the evidence presented up to the time of the motion to determine whether a question of fact existed and views such evidence in the light most favorable to the nonmoving party, granting that party every reasonable inference and resolving any conflict in the evidence in that party's favor. *Lewis v LeGrow*, 258 Mich App 175, 191; 670 NW2d 675 (2003). A directed verdict is appropriate only when no factual question exists over which reasonable jurors could differ. *Id.* at 192-193. If reasonable jurors honestly could have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

Plaintiff bears the burden of proof and must demonstrate a question of fact about whether defendant breached the non-competition agreement. See *Indiana-American Water Co, Inc v Seelyville*, 698 NE2d 1255, 1258 (Ind App 1998); see also *Kladis v Nick's Patio, Inc*, 735 NE2d 1216 (Ind App 2000); *Sallee v Mason*, 714 NE2d 757 (Ind App 1999). Balint testified that defendant performed "dock repair work" and "some dock work" for two companies in the restricted territory during the relevant period. Plaintiff argues that this testimony proves that defendant competed with plaintiff and violated the non-competition agreement. While this testimony establishes that defendant allegedly worked on dock equipment, it does not provide evidence that defendant sold dock equipment in competition with plaintiff.[2]

---

[1] The parties and the trial court were not certain exactly when defendant left plaintiff's employ.

[2] Balint testified at trial that plaintiff is in the business of selling dock equipment.

Although not at issue on appeal, the Dock Rite tax returns and defendant's Dock Rite business card also do not provide evidence that defendant sold dock equipment in competition with plaintiff. In short, there is no evidence that defendant sold dock equipment or otherwise engaged in business competitive with plaintiff. We therefore find that plaintiff failed to demonstrate a question of fact regarding whether defendant breached the non-competition agreement.

Plaintiff argues that uncertainty of damages is not a bar to recovery because mathematical certainty of damages is not required. Plaintiff further contends that a reasonable jury could find that Balint's testimony is sufficient to warrant nominal damages, since nominal damages are always available for breach of contract. Because we have concluded, *supra,* that plaintiff failed to present any evidence of the alleged breach, we need not address these issues.

Plaintiff also argues that uncertainty of damages cannot prevent its recovery because the uncertainty results from defendant's refusal to provide discovery. Plaintiff asserts that, if defendant had provided the Dock Rite customer list during discovery as required, plaintiff could have obtained information from those customers about its lost profits. Plaintiff had numerous opportunities to compel pre-trial discovery. Plaintiff never brought a Motion to Compel on for hearing and, thus, never gave the trial court an opportunity to address discovery issues. Consequently, the issue of pre-trial discovery was not properly before the trial court and is not properly before this Court.

Plaintiff also argues that the trial court abused its discretion in denying its request to reopen proofs. We review a trial court's ruling on a motion to reopen proofs for an abuse of discretion. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959); *Hunt v Freeman*, 217 Mich App 92, 100; 550 NW2d 817 (1996). To determine whether proofs should be reopened, this Court must consider whether there would be prejudice to the defendant, undue advantage to the plaintiff, or inconvenience to the court or parties. *Bonner, supra*, 356 Mich 541. This Court also evaluates the merit of the request and the reasonable diligence used in obtaining the newly discovered evidence. *Cowan v Anderson*, 184 Mich 649, 656; 151 NW 608 (1915).

Relying on *Serifanian v Associated Materials Supply Co*, 7 Mich App 275, 281-182; 151 NW2d 345 (1967) and *Kornicks v Lindy's Supermarket*, 24 Mich App 668; 180 NW2d 847 (1970), plaintiff argues that the trial court should have reopened proofs because plaintiff was seeking to establish a necessary element of its case, and because Balint was prepared to testify without delay. We distinguish *Serifanian* and *Kornicks*. The inconvenience and prejudice to defendant is considerably greater here. In the case before us, a reopening of proofs would have involved entering into evidence a new exhibit that was previously unknown to defendant's counsel. Defendant's counsel would not have been prepared to cross-examine Balint or present rebuttal witnesses. Moreover, unlike *Serifanian* and *Kornicks*, the evidence in question has little meritorious value. See generally *Cowen, supra*, 184 Mich 656. The customer list does not provide any evidence that defendant made sales or provided services in violation of the non-competition agreement. It is merely a list of customers and their locations, and provides no explanation of defendant's business activities.

We further note that plaintiff failed to exercise reasonable diligence in obtaining the customer list as newly discovered evidence. See *Cowan, supra,* 184 Mich 656. Because the customer list had been in Balint's possession since early 1999, plaintiff had ample opportunity to

discover the customer list and produce the same. Furthermore, Balint had testified twice at trial, giving plaintiff's counsel ample opportunity to question Balint about the customer list.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens