STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0388

Manufacturing Solutions of Minnesota, Inc., et al.,
Appellants,

vs.

Abrasive Specialists, Inc.,
Respondent.

Filed September 4, 2018
Reversed
Smith, Tracy M., Judge

Anoka County District Court
File No. 02-CV-16-6187

Wm. Christopher Penwell, Siegel Brill, P.A., Minneapolis, Minnesota (for appellants Manufacturing Solutions of Minnesota, Inc. and Darren Ray)

Mark S. Enslin, Mary O'Brien, Ballard Spahr LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Appellants Manufacturing Solutions of Minnesota Inc. (MSI) and Darren Ray appeal the district court's dismissal of their complaint, denial of their motion for declaratory judgment, and grant of attorney fees to respondent Abrasive Specialists Inc.

(ASI). They argue that the district court erred in refusing to declare that Ray could work for MSI without violating a noncompete agreement between Ray and ASI before the expiration of that agreement's term. Appellants further argue that ASI is not entitled to attorney fees because defending against a declaratory judgment action does not constitute "enforcing" a noncompete agreement. Because the district court erred in denying appellants' motion for declaratory judgment, and because ASI is not a prevailing party in this case, we reverse.

FACTS

From 2004 to May 20, 2016, Ray worked for ASI as an implementation specialist. In that role, he sourced and quoted cutting-tool requirements for customers, processed customer orders, purchased products, and set up inventory-management systems at customer sites. In 2010, Ray and ASI entered into a noncompete agreement. That agreement says, in relevant part:

> For a period of one (1) year immediately following the termination of Employee's employment . . . Employee shall not provide any services the same as or similar to a Company Product, including any services provided by the Company, to any Company client. As used in this paragraph, Company client includes any person or business entity to whom the Company provides Company Product during the Non-Competition Term and any person or business entity to whom the Company provided Company Product at any time during the three (3) years prior to the termination of Employee's employment with the Company.
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> . . . .
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> During the Non-Competition Term, Employee shall not communicate with any Company client, or interfere in any way in the relationships between the Company and Company

> clients, with the objective of facilitating or encouraging the transfer of all or any portion of any client's business from the Company to another person or entity. During the Non-Competition Term, Employee also agrees not to make any statements or other communications that damage or tend to damage the Company's relationships with its clients.
>
> . . . .
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> In addition to other remedies set forth herein, the Company shall be entitled to reasonable attorneys' fees, costs and expenses incurred as a result of Employee's breach and / or in the enforcement of this Agreement.

On May 20, 2016, Ray's employment with ASI ended. By October, Ray had found potential employment at MSI, and MSI reached out to ASI in an attempt to reach an understanding on how Ray could work at MSI without violating the noncompete agreement. MSI proposed having Ray work only "with signed MSI integration customers" during the noncompete term. MSI reasoned that, because integration customers purchase "all or virtually all of the supplies needed to run" their business from one dealer, by limiting Ray's customer interactions to MSI's integration customers, Ray would not be working with ASI customers and thus would be complying with the noncompete agreement. ASI refused to approve of this arrangement.

In December 2016, appellants filed a complaint seeking (1) declaratory judgment that Ray could work for MSI without violating the noncompete agreement if he were limited to MSI's integration customers and (2) damages for tortious interference with prospective business advantage. ASI filed an answer that included counterclaims for (1) declaratory judgment that the employment proposed by appellants would cause Ray to

breach the noncompete agreement and (2) attorney fees, costs, and expenses incurred by ASI in connection with the lawsuit.

Appellants filed a motion for declaratory judgment that Ray could work for MSI without violating the noncompete agreement so long as he had no contact with "(a) ASI integration customers as of May 20, 2016 who have since become MSI integration customers or (b) any current ASI integration customer who becomes an MSI integration customer prior to May 20, 2017." In their supporting memorandum, appellants identified 42 MSI customers they believed Ray could work with under such a declaration. ASI responded by arguing that, of the 42 listed customers, 18 had "also purchased product through ASI during the three year period immediately before Mr. Ray's departure" and, therefore, if Ray had contact with those customers, he would violate the noncompete agreement. ASI did not identify the 18 customers.

The district court held a hearing on appellants' motion on February 10, 2017. Following the parties' initial arguments, the court suggested a recess for the parties to attempt to settle the case. When they returned, appellants orally narrowed the declaration they sought. Instead of seeking a declaration that Ray could have contact with the 42 originally listed MSI customers, appellants sought a declaration that he could work with the 24 MSI integration customers "for which there is no overlap" and an order compelling ASI to identify the 18 customers for which there was overlap. The district court permitted appellants to submit a revised proposed order to this effect. ASI opposed the proposed modification, arguing that it was "a fishing expedition to find out who is on our customer list."

Appellants filed their revised proposed order the day of the hearing, and a week later ASI filed a memorandum in opposition. ASI argued that the proposed order was improper because there was no procedural rule allowing appellants to orally modify their motion for declaratory judgment and because the proposed order would improperly "open up [ASI's] customer lists for examination."

On April 6, the district court filed an order dismissing appellants' complaint, granting ASI's counterclaim for attorney fees, and directing ASI to submit an affidavit of attorney fees, costs and expenses. Following the submission of a motion for attorney fees and accompanying documentation, the district court ordered appellants to pay ASI's attorneys $23,272.50. Before that order was reduced to a judgment, appellants appealed to this court the order dismissing their complaint and the order awarding attorney fees. We questioned jurisdiction because final judgment had not been entered on the order granting attorney fees. Appellants voluntarily dismissed that appeal, stipulated to entry of final judgment against them for $35,768 in attorney fees (based on additional costs incurred by ASI since the initial order granting fees), and deposited that amount with the district court.

Appellants then appealed.

D E C I S I O N

I. This court has jurisdiction over appellants' appeal.

Before reaching the merits of appellants' appeal, we address ASI's assertion that we lack jurisdiction over this appeal because appellants' affidavit of filing with this court states that appellants filed a notice of appeal with the Hennepin County District Court Administrator although this is an appeal from a judgment rendered in Anoka County. "The

interpretation of procedural rules, including the Rules of Civil Appellate Procedure, presents a question of law that we review de novo." *Crowley v. Meyer*, 897 N.W.2d 288, 292 (Minn. 2017).

ASI argues this court lacks jurisdiction over this appeal because, "[u]pon information and belief, Appellants did not file a Notice of Appeal with the Anoka County Court Administrator" within the time period permitted to perfect an appeal. Appellants counter that one merely need review the district court's docket to see that a notice of appeal was filed with the Anoka County District Court Administrator on March 9, 2018, within the requisite time period.

"An appeal shall be made by filing a notice of appeal with the clerk of the appellate courts and serving the notice on the adverse party or parties within the appeal period." Minn. R. Civ. App. P. 103.01, subd. 1. "The appellant shall at the same time also file a copy of the notice of appeal with the trial court administrator." *Id.* The notice of appeal filed with the clerk of the appellate courts must be accompanied by "proof of filing with the administrator of the trial court in which the judgment or order appealed from is entered or filed." *Id.*, subd. 1(d). But filing with the district court administrator is not a jurisdictional requirement. *See id.*, Advisory Comm. Cmt. 1998 amendments ("Failure of an appellant to take any step other than the timely filing and service of the notice of appeal does not affect appellate jurisdiction.").

ASI's argument fails because filing with the district court administrator is not jurisdictional. Moreover, our review of the district court's docket confirms that appellants

did file with the correct district court administrator, notwithstanding the affidavit's incorrect reference to Hennepin County. We have jurisdiction over this appeal.

II. The district court erred in denying declaratory judgment that Ray could work with MSI customers not covered by the noncompete agreement.

Appellants argue the district court erred in refusing to declare that Ray could work for MSI without violating the noncompete agreement if his customer interactions were limited to the 24 MSI customers who were not within the scope of the agreement. Resolving this issue requires us to interpret the contract between ASI and Ray. "The construction of a contract . . . is a question of law, so we review the district court's interpretation of the contract's language de novo." *Linn v. BCBSM, Inc.*, 905 N.W.2d 497, 504 (Minn. 2018).[1]

The noncompete agreement provides that Ray may not provide any services covered by the agreement to "any person or business entity to whom the Company provides Company Product during the Non-Competition Term and a person or business entity to whom the Company provided Company Product at any time during the three (3) years prior to the termination of Employee's employment with the Company."

In its revised proposed order, appellants sought declaratory judgment that Ray could work with 24 MSI customers that were not ASI customers.

[1] Although the noncompete period ended in May 2017 and declaratory relief concerning the terms of the noncompete agreement is no longer available, this appeal is not moot because the award of attorney fees to ASI depends on whether appellant's declaratory judgment claim was properly dismissed.

We first address the procedural issue raised. ASI argues that consideration of the proposed order would have been improper because no procedural rule permitted appellants to propose declaratory relief that differed from that sought in their complaint. The district court, however, specifically permitted appellants to submit a proposed order following the parties' settlement discussions, and we conclude that the district court had discretion to do so. *Cf. Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (holding that decision regarding amending a complaint will not be reversed absent a clear abuse of discretion).

We now turn to the substantive issue. In rejecting appellants' proposed order, the district court observed that it was "unclear at best whether [appellants'] revised proposal would violate the Agreement." Appellants argue this observation is erroneous because, by the terms of the agreement, Ray was not prohibited from working with MSI customers that were neither current ASI customers nor ASI customers in the three years leading up to the termination of Ray's employment with ASI. In other words, appellants argue that the district court expanded the scope of the noncompete agreement to cover customers not within its terms.

We agree. The text of the noncompete agreement is clear: the prohibition on customer contact extends only to customers that were ASI customers "during the Non-Competition Term" and customers that were ASI customers "during the three (3) years prior to the termination of Employee's employment with the Company." But of the 42 customers listed by MSI, the district court found that "ASI did not do business with" 24 during those time periods. Because nothing in the agreement prohibited Ray from working

with those 24 customers, it was error for the district court to deny appellants' motion for a declaratory judgment that Ray could work with them.

In urging an opposite conclusion, ASI argues—and the district court found significant—that permitting Ray to work with any MSI customers, whether covered by the noncompete agreement or otherwise, would force the district court to "police MSI to make sure that Ray is screened off from providing services to the 18 companies [covered by the noncompete agreement] prior to May 21, 2017." Given the past history of litigation between ASI and MSI, this concern is reasonable. However, "[c]ontracts by their nature, involve the possibility of breach." *Cmty. Partners Designs, Inc. v. City of Lonsdale*, 697 N.W.2d 629, 634 (Minn. App. 2005). The district court was no more required to "police" the contract in this case than in any other contract case. If Ray breached the noncompete agreement, ASI could have brought a breach-of-contract claim. But the possibility of a breach does not change the terms of the parties' agreement, and those terms permitted Ray to work with 24 of MSI's integration customers.

III. Ray was entitled to a declaration of which customers he was prohibited from working with.

Having concluded that Ray could work with 24 of MSI's integration customers without violating the noncompete agreement, we turn to the next argument asserted by MSI: that the district court erred in refusing to order ASI to disclose the 18 customers that were the subject matter of the noncompete agreement in order to provide declaratory relief. We review the refusal to enter a declaratory judgment for an abuse of discretion. *Hempel v. Creek House Trust*, 743 N.W.2d 305, 314 (Minn. App. 2007).

Under the Uniform Declaratory Judgments Act (UDJA), "[a]ny person interested under a . . . contract . . . or whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." Minn. Stat. § 555.02 (2016). Contracts "may be construed either before or after there has been a breach thereof." Minn. Stat. § 555.03 (2016). The UDJA is to be "liberally construed and administered," Minn. Stat. § 555.12 (2016), but "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Minn. Stat. § 555.06 (2016).

Appellants argue that the district court erred in not ordering ASI to disclose which of MSI's 42 customers were within the scope of the noncompete agreement because, without that disclosure, Ray could not know what his obligations were under the agreement. More specifically, appellants argue that by not ordering such a disclosure, the district court effectively denied Ray a "declaration" of his "legal relations" under the noncompete agreement. *See* Minn. Stat. § 555.02.

We agree. A declaratory judgment was appropriate here because appellants sought a determination of Ray's obligations under the agreement and the claim for that determination "involve[d] a genuine conflict between adverse parties," as evidenced by ASI's opposition to having Ray work with any of MSI's integration customers. *See Hempel*, 743 N.W.2d at 314. Additionally, declaring which of MSI's customers were

within the scope of the noncompete agreement "would resolve the dispute" because the parties would then know which customers Ray could and could not work with. *See id.*

The district court denied appellants' motion to order ASI to disclose the covered customers on three bases: (1) because it was appellants that "brought this action . . . ASI should not be forced to divulge the names of the 18 customers it did business with between May 20, 2013 and May 20, 2016"; (2) because appellants "brought this action in December 2016, almost seven months after ASI terminated Ray[,] . . . [they] compounded the issue by waiting to file the action until more than half of the non-competition term had expired"; and (3) because "[t]here is a risk of Ray violating the non-competition clause[,] . . . and it is not the function of the Court to police MSI." None of these reasons justifies the district court's exercise of discretion in denying appellants' motion.

Taking the reasons in reverse order, as discussed above, the risk of a breach of contract does not affect a party's entitlement to a declaration of their rights under the contract. Next, a "lapse of time does not affect the right to make [a] motion." *Feikert v. Wilson*, 38 Minn. 341, 341, 37 N.W. 585, 585 (1888); *cf. Pulver v. Commercial Sec. Co.*, 135 Minn. 286, 291, 160 N.W. 781, 783 (1917) (noting that "time does not affect" the power to set aside an order when a party challenges it on grounds of lack of notice). Appellants were just as entitled to a declaration of which customers Ray could contact partway through the noncompete term as they were the day that term began.

Finally, regarding the district court's first reason for denying appellants' motion—that ASI should not be required to disclose the customers covered by the noncompete agreement because it was appellants that brought the action—this reason runs counter to

the command of the UDJA. Under the UDJA, parties to a contract are entitled to declaration of their obligations, Minn. Stat. § 555.02, even if there has not yet been a breach of the contract. Minn. Stat. § 555.03. The UDJA thus contemplates that a party can have its obligations declared under the contract even in situations outside a breach-of-contract action, such as this one. Furthermore, the UDJA provides but one reason for a court to deny making such a declaration: that doing so "would not terminate the uncertainty or controversy giving rise to the proceeding." Minn. Stat. § 555.06. Here, however, declaring which 18 customers were covered by the noncompete agreement would have effectively terminated the uncertainty as to which customers Ray could and could not have contact with while working at MSI prior to May 20, 2017. Therefore, the criterion for withholding declaratory judgment was not met, and the district court abused its discretion in not requiring ASI to identify those 18 customers.

We note that, throughout this litigation, ASI has argued that its customer list is confidential and that, because the list is confidential, ASI should not be required to disclose it unless ASI chooses to bring a breach-of-contract claim against Ray. We are not insensitive to these confidentiality concerns, but they were effectively mooted when MSI published a list of all of its integration customers to ASI. ASI has not put forward any explanation, either before the district court or this court, of how identifying which of MSI's integration customers also did business with ASI in some capacity in the last three years would harm the company's interests. ASI was not required to identify potential new customers that MSI could poach away; rather, it was merely required to identify which companies *that already did most of their business with MSI* had also done any business

with ASI in the last three years. Moreover, if ASI wishes to contract with its former employees in order to restrict them from contacting its customers, the employees must be able to know who those customers are in order to comply with the contract. *Cf. Parker v. Fryberger*, 171 Minn. 384, 388, 214 N.W. 276, 277 (1927) (considering whether "proof of performance [would be] so vague that the jury could not determine the matter"). And the only way to do so is for ASI to share that information with the former employee.

IV. ASI is not entitled to attorney fees because it is not a prevailing party.

Appellants' final argument is that the district court erred in granting ASI's counterclaim for attorney fees because the noncompete agreement only provides for an award of attorney fees if ASI brings a breach-of-contract claim or otherwise has to "enforce" the agreement, but, according to appellants, defending against this declaratory judgment claim does not constitute enforcement. We agree ASI is not entitled to attorney fees but decide so on another ground: ASI is not a prevailing party. *See First Nat'l Bank of the N. v. Miller Schroeder Fin., Inc.*, 709 N.W.2d 295, 299 (Minn. App. 2006) ("[W]e may properly decide a case based on arguments not raised by the parties when our reasoning is neither novel nor questionable."), *review denied* (Minn. Apr. 26, 2006).

"The general rule in Minnesota is that 'attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery.'" *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008) (quoting *Barr/Nelson, Inc. v. Tonto's Inc.*, 336 N.W.2d 46, 53 (1983)). Moreover, even if a contract provides for attorney fees, the party seeking attorney fees under the contract must be a prevailing party because "considerations of public policy militate against awarding attorney fees to a

nonprevailing party." *See Jadwin v. Kasal*, 318 N.W.2d 844, 848 (Minn. 1982) (refusing to enforce agreement providing for attorney fees "because . . . the bank is not a prevailing party in this action"). "The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998).

Here, we are reversing the judgment of the district court as regards its dismissal of the complaint and denial of a declaration that Ray could work with 24 of MSI's customers before May 20, 2017 without violating the noncompete agreement. Thus, ASI is no longer a party "in whose favor the decision . . . is rendered and judgment entered" and is not a prevailing party. It is thus not entitled to attorney fees under the contract. ASI conceded as much at oral argument, saying, "If [appellants] were successful in their declaratory judgment action, and we were unsuccessful in ours, . . . we don't have a basis [for attorney fees]." We, therefore, reverse the judgment of the district court granting attorney fees to ASI.

Reversed.