IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ANIL VAZIRANI, *et al.*, *Plaintiffs/Appellants*,

v.

MIL-CO, INC., *et al.*, *Defendants/Appellees*.

No. 1 CA-CV 15-0808
FILED 4-20-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-012983
The Honorable J. Richard Gama, Judge *Retired*

REVERSED AND REMANDED

COUNSEL

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By David G. Bray
Counsel for Plaintiffs/Appellants

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By Donald Peder Johnsen, Jodi Renee Bohr, Hannah H. Porter
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

C A T T A N I, Judge:

¶1 Anil Vazirani, Vazirani & Associates Financial, LLC, and Secured Financial Services, L.L.C. ("SFS") (collectively "Vazirani") appeal from the superior court's dismissal of their complaint against Mil-Co, Inc., and several affiliated insurance advisors ("Advisors") asserting breach of contract and related claims. For reasons that follow, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Vazirani's complaint alleged that Advisors are licensed insurance advisors who entered into contracts with SFS in 2011 for marketing and sales support. SFS provided Advisors with access to "life, health and annuity insurance related sales, marketing and training materials and other systems developed and owned by 'SFS.'" In exchange, Advisors agreed to place insurance business through carriers associated with Vazirani. The contracts included an additional requirement that Advisors continue to "place all business thr[ough] SFS/Vazirani & Associates, LLC for a period of two years from the date of termination" (the "Business Placement Provision") so that Vazirani would continue to receive "override" commissions during that additional time period.

¶3 Advisors' contracts also included these mutual non-disparagement and non-solicitation clauses:

> Advisor will not make any disparaging remarks against SFS/Vazirani & Assoc.
>
> . . .
>
> "Advisor" further agrees that while this agreement is in force and for a period of two (2) years immediately following the termination of this agreement, "Advisor" will not solicit, for any means, by mail, by phone, by personal meeting, or by any other means, either directly or, indirectly solicit any advisor, whose name became known to them during their relationship with SFS/Vazirani & Assoc. And SFS will agree to the same for MILCO.

¶4 On September 11, 2014, Advisors notified Vazirani that they were terminating their contracts and sought Vazirani's "cooperation in an immediate release with any/all insurance companies they are licensed with through [Vazirani's] organization." Vazirani then learned from several

insurance carriers that Advisors were in the process of transferring their business to another marketing organization, which would potentially deprive Vazirani of future override commissions.

¶5 Vazirani sued Advisors for breach of the Business Placement Provision and breach of the covenant of good faith and fair dealing. Vazirani also alleged that one of the Advisors, Todd Miller, violated the non-disparagement and non-solicitation provisions "by calling a number of agents in Vazirani's downline to disparage Vazirani (claiming [] Vazirani was 'greedy' and acting in bad faith towards agents)" after the dispute arose. The complaint additionally asserted a claim of tortious interference against Mil-Co.

¶6 On Advisors' motion, the superior court dismissed Vazirani's complaint in full. The court determined that the Business Placement Provision was unenforceable because

> it requires Defendants to sell only the products that are offered by carriers with whom Plaintiffs are affiliated. . . . This anti-competitive clause lacks any geographic boundarie[s], is not limited to customers with whom the parties had a previous relationship, and is not limited by product line. Rather it restricts Defendants with respect to "all business" whether Plaintiff engaged in this business or not.
>
> . . . Plaintiffs have failed to establish that the restriction is reasonably necessary to protect its legitimate protectable interests. . . . Plaintiffs have failed to establish a legally valid interest in restricting Defendants' business activities in markets not served by Plaintiffs or in restricting business in geographic regions in which the parties never conducted any business. . . .
>
> In addition, the contractual language used applies to "all business" and prevents Defendants from placing any insurance products. The language is not focused on customers with whom Defendants previously transacted business.

The court made no express rulings on Vazirani's other claims.

¶7 Vazirani filed a motion for new trial, which the superior court denied. The court entered final judgment dismissing Vazirani's entire

complaint, and Vazirani timely appealed. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).[1]

DISCUSSION

¶8 We review dismissal of a complaint under Arizona Rules of Civil Procedure 12(b)(6) de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). We similarly review de novo the superior court's interpretation of the parties' contracts. *Great W. Bank v. LJC Dev., LLC*, 238 Ariz. 470, 475, ¶ 9 (App. 2015). We assume the truth of all well-pleaded factual allegations and construe all reasonable inferences in favor of Vazirani. *See Botma v. Huser*, 202 Ariz. 14, 15, ¶ 2 (App. 2002). We will affirm the dismissal only if Vazirani would not have been entitled to relief under any set of facts susceptible of proof. *Coleman*, 230 Ariz. at 356, ¶ 8.

I. Business Placement Provision.

¶9 Vazirani argues that the superior court erred by dismissing its claim based on alleged violation of the Business Placement Provision. Advisors counter that dismissal was proper because the Business Placement Provision—which, as described above, obligated Advisors to "place all business thr[ough] SFS/Vazirani & Associates, LLC" for two years after termination of their contracts with Vazirani—is an unreasonable restrictive covenant that prevents them from working with a competing marketing organization and from selling insurance products from carriers not affiliated with Vazirani.

¶10 Generally, "[t]here are two types of restrictive covenants: covenants not to compete and anti-piracy, or 'hands off,' agreements." *Hilb, Rogal & Hamilton Co. v. McKinney*, 190 Ariz. 213, 216 (App. 1997). The Business Placement Provision does not fit neatly in either category; the parties did not have an employment relationship and the Business Placement Provision does not appear to preclude Advisors from selling to anyone. The Provision does not prevent Advisors from pursuing employment in their chosen field or from competing with Vazirani. The Business Placement Provision instead appears to limit what products Advisors can sell.

¶11 Assuming without deciding that the Business Placement Provision is a restraint on trade, it may be enforced if it is reasonable. *Olliver/Pilcher Ins., Inc. v. Daniels*, 148 Ariz. 530, 532 (1986). "The

[1] Absent material revisions after the relevant date, we cite a statute's current version.

determination of '[r]easonableness is a fact-intensive inquiry that depends on the totality of the circumstances.'" *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 213 Ariz. 24, 26, ¶ 9 (2006) (alteration in original) (citation omitted). "[W]hat is reasonable depends on the whole subject matter of the contract, the kind and character of the business, its location, the purpose to be accomplished by the restriction, and all the circumstances which show the intention of the parties." *Id*.

¶12 Vazirani alleged that it provided Advisors extensive marketing and sales support in exchange for the override commissions called for in the contracts, and thus contended that the Business Placement Provision was intended to ensure sufficient compensation for that support. *See Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, 372, ¶ 12 (App. 2002) (noting that a restrictive covenant may be reasonable if it protects a legitimate interest and is not merely protection from competition). Vazirani also alleged that it was willing to revise the contracts to accommodate "any particular needs of a contracted agent" and that it did so, for example, by exempting Advisors' preexisting business with ELCO from the Business Placement Provision. Vazirani further alleged that, even absent any contractual restrictions, insurance carriers typically will not process an agent transfer request less than six months after the request is made. While the Business Placement Provision extends beyond this six-month baseline, Advisors do not show as a matter of law that two years is an unreasonable time period in these circumstances. Given these circumstances, Advisors failed to show as a matter of law that the Business Placement Provision was an unreasonable restriction of their ability to conduct business. Accordingly, dismissal was not warranted. *See Koss Corp. v. Am. Express Co.*, 233 Ariz. 74, 79, ¶ 11 (App. 2013).

II. Other Claims.

¶13 Vazirani also contends the superior court erred by dismissing the other claims asserted in its complaint. Neither the superior court's initial ruling nor its ruling on Vazirani's motion for new trial expressly addressed these claims, and we read the rulings as dismissing these claims because they are dependent on the Business Placement Provision claim. Because we reverse dismissal of the Business Placement Provision claim, the other claims were not subject to dismissal on that basis, and we reverse. In so ruling, we have not addressed Advisors' merits arguments for dismissal of these claims independent of the Business Placement Provision claim, and our reversal is without prejudice to the parties re-urging these other arguments on remand.

CONCLUSION

¶14 We reverse the superior court's ruling dismissing Vazirani's complaint in full, and remand for further proceedings. As Advisors have not prevailed on appeal, we deny their request for an award of attorney's fees under A.R.S. § 12-341.01. As the prevailing party, Vazirani is entitled to an award of costs on appeal upon compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA