IN THE COURT OF APPEALS OF IOWA

No. 9-049 / 08-0872
Filed May 29, 2009

M & F LIVESTOCK, a division of
L.L. PARKS LIVESTOCK, INC.,
Plaintiff-Appellant/Cross-Appellee,

vs.

STEVE MOHR,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Carroll County, Ronald H. Schechtman, Judge.

Appeal and cross-appeal from the district court's rulings on a covenant not to compete, a misrepresentation claim, and the amount of a supersedeas bond. **AFFIRMED IN PART AND MODIFIED IN PART ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Sean P. Moore, Michael R. Blaser, and Elizabeth A. Coonan of Brown, Winick, Graves, Gross, Baskerville & Schoenebaum, P.L.C., Des Moines, for appellant.

John Werden of Van Dyke & Werden, P.L.C., Carroll, for appellee.

Heard by Sackett, C.J., and Vogel, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

SACKETT, C.J.

M&F Livestock, a division of L.L. Parks Livestock, Inc., appeals from the various district court rulings in its lawsuit against Steve Mohr. The appellant contends the court erred (1) in invalidating as unconscionable the non-competition covenant in its employment agreement with Mohr, (2) in failing to reform the non-competition covenant, and (3) in calculating the amount of the supersedeas bond. The cross-appellant contends the court erred in dismissing his claim for misrepresentation. We affirm in part and modify in part on appeal. We affirm on cross-appeal.

I. Background and District Court Proceedings.

Before the events that led to the lawsuit on appeal, Mohr worked as a pig broker for M&F Trading, Inc., a company in Ontario, Canada, that was owned by Farms.com. Lawrence Parks owns L.L. Parks Livestock, Inc., which is in the business of buying and selling feeder pigs. For a time, ending in 2004, Parks was a member of the board of directors of Farms.com. In 2006 and 2007 M&F Trading experienced cash flow problems that led to delays in paying for pigs purchased. In 2006 Parks began negotiations with Farms.com to purchase the assets of M&F Trading. He was interested in the purchase only if four key employees, especially Mohr, were retained. On January 16, 2007, Parks sent a letter of intent and an employment agreement[1] to M&F Trading's manager, Chris Gehl, to distribute to the other key employees for their signatures. Gehl e-mailed the documents to Mohr on January 16. Mohr signed the

[1] At particular issue in this case are paragraphs seven through nine of the agreement. Paragraph seven is a covenant not to compete anywhere in the United States or Canada for one year. Paragraph eight contains covenants not to disclose or interfere. Paragraph nine contains a covenant not to solicit.

letter of intent, initialed the pages of the employment agreement, and returned them. Parks Livestock advanced $600,000 to M&F Trading, which assisted it in paying its suppliers in a more timely manner.

Between January 16 and March 30, Mohr and Parks spoke on the phone several times and met briefly on at least one occasion. Mohr expressed concerns to Parks. On Friday, March 30, the day set for closing the asset purchase, Parks again spoke with Mohr, who told him he did not think he was interested in working for a new company. Parks told Mohr that Mohr had signed the letter of intent and, based on that, Parks had advanced $600,000 to M&F Trading. After discussion, Mohr indicated he was still on board. Parks concluded the asset purchase that day, sending an additional $600,000. Also that day, Mohr signed the articles of incorporation for Mohr Pork, L.L.C.

The articles of incorporation for Mohr Pork were filed on Monday, April 2. On Tuesday, April 3, Mohr e-mailed his resignation to Gehl "effective immediately." In his e-mail Mohr also stated:

> Talking to Lawrence [Parks] on Friday, I felt very pressured to stay on with M&F for a one year period. Which I agreed to do if Big Sky, Jay Clasing, and Tim Flaherty would agree to sign a contract with M&F Trading.[2] After our meeting this evening, I learned that they definitely would not go through M&F. I also told Lawrence Friday before he bought the company that I would have nothing to do with a do not compete clause. I do not want to compete.

Parks and Mohr met on April 11. Their accounts of the meeting differ greatly. Parks testified:

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[2] Parks testified that Mohr had been working on a contract between a producer, Big Sky, and finishers, Jade Farms and Tim Flaherty. The contract would have been an asset of M&F Trading that Parks purchased. On April 12, based on the issues between Parks and Mohr, Big Sky notified Parks and Mohr in writing that it would proceed with a direct contractual agreement with the finishers and not get involved in the issues between Parks and Mohr.

> I drove over to Des Moines to meet with Steve [Mohr] and we were there probably less than five minutes and Steve, you know, we weren't getting along at all and Steve just got up and said, there's lawyers that will take care of this and kind of walked out of the restaurant and that was—that was the end of the conversation. . . .

In contrast, Mohr testified:

> [H]e says it took five minutes, I think it took more like two minutes. We sat down, we each had a pop, he said right off the bat, he says, Steve, I own you, I bought you, and you're going to do what I tell you, you're going to work for me, and he says after a year, he says you can work for me for one year and he says I'll let you quit, but he says whatever you do after that, you're going to have to do it through Parks Livestock, so what he was telling me was that he had bought me, he owned me, and even after the year is up, evidently for the rest of my life, I had to work through him.

Injunction Proceedings. On April 18, the plaintiff filed a petition against Mohr alleging breach of contract and misappropriation of trade secrets, and seeking injunctive relief. Mohr filed an "answer, affirmative defenses, counter claim, and third party petition"[3] alleging wages due under his contract with M&F Trading, misrepresentation, abuse of process, violation of good faith and fair dealing, and that the agreements should be reformed, rescinded, or otherwise made equitable. Following oral arguments on the request for injunctive relief on June 14, 2007, the district court filed its decision on July 31, finding the existence of a contract between Mohr and M&F Livestock, that Mohr directly and materially breached the contract, and that injunctive relief was appropriate pending a trial on the merits of the contract dispute. The court temporarily enjoined Mohr from competing with M&F Livestock in Iowa, Nebraska, Minnesota, and Illinois for a year. It ordered that bond be posted in the amount of $168,750.

[3] He named M&F Trading, Lawrence Parks, and Chris Gehl as third-party defendants.

Trial. In March of 2008, Mohr settled with M&F Trading and dismissed his claims against it. In April of 2008, a jury trial on the plaintiff's claims and the defendant's counterclaims was held.[4] Prior to submission of the case to the jury, the plaintiff dismissed its claim that Mohr misappropriated trade secrets. Mohr dismissed his claims against Gehl. The court granted the plaintiff's motion for directed verdict on Mohr's claims for abuse of process and breach of good faith and fair dealing. It reserved ruling on the plaintiff's motion for directed verdict on Mohr's misrepresentation claim. The only claim submitted to the jury was the contract claim.

The jury rendered special verdicts. It found the agreement Mohr signed and initialed in January of 2007 was a valid contract with adequate consideration that was binding on him when Parks entered into the asset purchase with M&F Trading. It further found that none of the purported conduct of the parties on March 30 served to abandon the January agreement, including its covenants not to compete. The jury answered "no" to the third question, which read, "Do you find that any purported agreement between the parties on March 30, 2007, incorporated covenants not to compete contained in [the January agreement], paragraphs 7 and 9?"

On April 24, the court dictated its ruling from the bench, but agreed to formalize its ruling in writing. In its oral ruling on the injunction and the covenants not to compete, the court found "absolutely no evidence" to show the geographic area of limitation was appropriate. It further found the plaintiff's "gain from the covenant was intentionally and grossly disproportionate" to the injury the defendant would sustain from enforcement of

[4] The trial was not bifurcated. The jury considered the contract claim. The court "sitting in equity, simultaneously heard the injunctive evidence as offered on the breach of contract claim."

the covenant. It expressly found "the restraint to be unconscionable and unenforceable." The court dissolved the temporary injunction and concluded the defendant suffered damages in the amount of $125,000 because of the injunction. It made judgment in that amount a lien against the $168,750 bond that had been posted.

On April 25, the court filed what was captioned "compliance with Iowa rule 1.933," that "direct[ed] such judgment on the special verdict and answers as appropriate." The court noted "some different understandings of the effect of the jury's answer to question #3" resulted from its directions to the jury. The court stated:

> [T]he answers to questions 1 and 2 establish a contract, including the covenants not to compete or solicit. The answer to question 3 does not alter its findings of facts in questions 1 and 2. It is consistent therewith. The answer to question 3 is not particularly relevant, but shall stand for whatever force it may have herein, which seems severely limited.

The court dismissed the plaintiff's petition and the defendant's counterclaim and cross-petition. It assessed costs three-fourths to the plaintiff and one-fourth to the defendant.

In its April 28 written ruling on the injunction, the court supplemented its verbal ruling "for explanatory purposes," but expressly did "not intend to disturb the jury's factual findings" that there "was a valid, enforceable contract . . . and, that any conduct by the parties on the closing date . . . did not serve to abandon the contract, including the restrictive covenants." The court confirmed its refusal "to reform the employment contract, there being no evidence of its need to protect the employer's legitimate interest, [and it was] unreasonably restrictive for the employee, and contrary to the public's interest."

Following the plaintiff's notice of appeal and the defendant's notice of cross-appeal, the plaintiff requested that the court order a portion of the injunction bond be

converted into a supersedeas bond and the balance disbursed to the plaintiff. Following the defendant's resistance, the court denied the request and set the supersedeas bond at $25,000. The plaintiff moved for clarification of the amount, citing Iowa Rule of Appellate Procedure 6.7(2), which sets the amount of a supersedeas bond at 110 percent of the amount of a money judgment. Following the defendant's resistance, the court considered the award of attorney fees in the amount of $12,400 plus interest in its calculation of the supersedeas bond, which it set at $15,000.

The plaintiff appeals from the court's refusal to enforce or reform the covenant not to compete and its order setting the amount of the supersedeas bond. The defendant cross-appeals from the court's dismissal of his misrepresentation claim.

II. Scope of Review.

The parties disagree on the scope of review. We consider and review a case in the same manner as the district court tried the case. *Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 690 (Iowa 2005). Although the petition for injunctive relief was docketed in equity, two of the three counts pled were breach of contract and misappropriation of trade secrets. Both counts sought money damages. "If, as here, both legal and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its controlling issue." *Mosebach v. Blythe*, 282 N.W.2d 755, 758 (Iowa Ct. App. 1979); *see also Berry Seed Co. v. Hutchings*, 247 Iowa 417, 422, 74 N.W.2d 233, 237 (1956) (noting cases in which the remedy is the recovery of money based on breach of contract are usually actions at law). The defendant requested a jury trial and alleged legal counterclaims. The court ruled on evidentiary objections, which is "the hallmark of a law trial, not an equitable

proceeding." *Sille v. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980). We conclude our review is for correction of errors at law. Iowa R. App. P. 6.4.

III. Discussion.

Covenant Enforcement. The plaintiff contends the court erred in refusing to enforce or reform the covenant not to compete. Paragraph 11 of the employment agreement initialed by Steve Mohr provided for enforcement of the covenant not to compete that was contained in paragraph 7. It gave any court that found the any of the restrictions "not completely enforceable" because they were not reasonable "the right and power to interpret, alter, amend or modify any or all of the terms contained herein to include as much of the scope, time period and geographic area as will render such restrictions reasonable and enforceable." The district court refused to reform the terms because it determined the covenant was unconscionable. In its oral ruling, the court reviewed applicable case law, then stated:

> It appears that this effort at such a ridiculously broad territory, without restriction to [Mohr's] sphere of customers, imports a sinister motive with dishonest purpose, and absence of good faith, bad faith, and unconscionable from its beginning.
>
> As this court has stated under these circumstances, the court has no duty to judicially reform Rather, it has a duty to strike it and find unenforceable paragraphs 7 and 9 in the employment agreement. The court finds those things set forth that I read relating to oppressiveness and good faith and equity will not enforce an agreement of this type.

The covenant provided Mohr could not compete for a year in the United States or Canada in any business "similar to" or in competition with M&F. When imposing the temporary injunction, the court reduced the area to Iowa and the surrounding states. However, following the trial on a permanent injunction, the court ruled that even the reduced area was "far too protective."

In deciding whether to enforce a restrictive covenant, courts apply a three-pronged test: "(1) Is the restriction reasonably necessary for the protection of the employer's business; (2) is it unreasonably restrictive of the employee's rights; and (3) is it prejudicial to the public interest?" *Lamp v. Am. Prosthetics, Inc.*, 379 N.W.2d 909, 910 (Iowa 1986). The plaintiff argues the restriction was reasonably necessary to protect its interests, was not unreasonably restrictive, and was not prejudicial to the public interest. Concerning enforcement, the defendant argues (1) the jury's verdict on question three renders the question of enforcement moot, (2) M&F Livestock is not the proper party to enforce the covenants, (3) there was no consideration for the agreement, (4) conditions precedent to the agreement were not met, and (5) the covenants were unreasonable.

From the arguments in the defendant's brief and in oral argument, it appears the defendant has misunderstood the relevance and effect of the jury's answer to question three on the jury verdict form. The responses to questions one and two establish a valid employment agreement containing the covenants. The jury's answer to question three does not change that result. The court noted the limited value, if any of the answer to question three. We conclude the defendant is incorrect in his first three arguments. The court's decision did not find evidence of conditions precedent. The defendant is correct, however, that the covenants are unreasonable.

The plaintiff tacitly argues that it has stepped into the shoes of Mohr's previous employer in arguing the restriction was reasonably necessary to protect its interests. The case law suggests covenants not to compete are to protect an employer from a former employee pirating away its business, especially when using information and

relationships formed while employed. Here, Mohr never really worked for the plaintiff, so the plaintiff had nothing to protect until it purchased assets of M&F Trading, including its contracts. This problem with the plaintiff's argument is similar to the defendant's argument that M&F Livestock is not the proper party to enforce the covenants.

The district court properly determined the covenants failed all three prongs of the test set forth above, so that they were not enforceable as written. There was no showing of necessity to prevent Mohr from operating anywhere in North America. Almost all of his business was between some producers in Canada and finishers in Iowa, where he lives. The covenants as drafted far exceeded anything necessary to protect M&F Livestock from Mohr's operation of a hog brokerage. We affirm the district court's conclusion the covenants were unenforceable as written.

Covenant Reformation. The plaintiff also argues the court abused its discretion in not reforming the covenants to reduce the restrictions to the point they were enforceable. In *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 370 (Iowa 1971), the supreme court moved away from the prior all-or-nothing approach to enforcing covenants and allowed for the possibility of restricted enforcement under certain conditions:

> We now overrule *Brecher v. Brown* (1945), 235 Iowa 627, 17 N.W.2d 377, and adopt the rule that unless the facts and circumstances indicate bad faith on the part of the employer, we will enforce noncompetitive covenants to the extent they are reasonably necessary to protect his legitimate interests without imposing undue hardship on the employee when the public interest is not adversely affected.

Based on the reasoning in *Ehlers*, the plaintiff argues the court should have enforced the covenants to a more limited extent if the court found they were

unreasonable in extent—especially because the language of the agreement expressly gives the court the right to modify the covenants to make them reasonable. Citing *Ehlers*, the district court found the covenant restrictions evidenced bad faith on the part of the plaintiff, undue hardship on Mohr, and a negative effect on the public interest. Consequently, it refused to reform or modify the covenants, but rejected them entirely.

The plaintiff also cites to *Farm Bureau Service Co. v. Kohls*, 203 N.W.2d 209, 211 (Iowa 1972), in support of its argument courts will enforce overly-restrictive covenants "to whatever extent" the court finds reasonable. In this case, however, the defendant was competing against his former employer in a business he had learned only from this employer, with customers his employer had provided in a list, and in an area he had worked only for this employer. The covenant restricted the defendant from operating in two counties for two years. The court found this unduly restrictive and remanded the case for entry of a modified restriction to only six townships. In the case before us, the plaintiff did not teach the defendant the business, did not provide him with a list of customers, and did not have him operating in an area he had not worked before. There is no showing of necessity to protect the plaintiff's business, the exclusion of all of the United States and Canada is far broader than two counties, and the plaintiff never truly had the defendant working for it.

Iowa case law allows for reformation of restrictive covenants in limited circumstances not present here. It does not require reformation. The language of the agreement allows, but does not require reformation. We conclude the district court did not abuse its discretion. A reading of the transcript of its oral ruling shows a clearly-articulated basis for its exercise of discretion.

The cases cited by the plaintiff in which courts reformed covenants all relate to situations similar to *Farm Bureau*, where a former employee would be competing against a former employer in an area and business in which the employee had worked for the employer. Our prior comments about this type of restriction being more appropriate to protect M&F Trading, Mohr's former employer, than M&F Livestock, the company that purchased assets from M&F Trading, apply to this claim as well. We affirm the district court's careful, well-reasoned exercise of discretion.

Supersedeas Bond. The plaintiff contends the court erred in the amount it required the plaintiff to post as a supersedeas bond to stay execution of the judgment during the appeal. It requests that we order the immediate return of the excess amount.

Iowa Rule of Appellate Procedure 6.7(2) provides:

> If the judgment or order appealed from is for money, such bond shall be 110 percent of the amount of the money judgment, unless the district court otherwise sets the bond at a higher amount pursuant to the provisions of Iowa Code section 625A.9(2)(a). In no event shall the bond exceed the maximum amount set forth in Iowa Code section 625A.9(2)(b). In all other cases, the bond shall be an amount sufficient to save appellee harmless from the consequences of the appeal; but in no event less than $1000.

Iowa Code section 625A.9(2) (2007) provides for a bond exceeding 110 percent of the amount of the money judgment "upon making specific findings justifying such an amount," and sets forth some criteria the court must consider, none of which apply in the case before us.

The plaintiff posted a bond of $168,750 when the temporary injunction was imposed on the defendant. Following the trial, the court entered judgment of $125,000 in favor of the defendant and made that amount a lien against the bond. The court also ordered the plaintiff to pay $12,400 of the defendant's attorney fees. The plaintiff

moved to convert $151,140 of the injunction bond to a supersedeas bond[5] and to have the excess returned. Following the defendant's resistance, the court refused to disturb the injunction bond and set the supersedeas bond at $25,000. The plaintiff moved for clarification. Following the defendant's resistance, the court again refused to allow any use of the injunction bond, but reduced the amount of the supersedeas bond to $15,000.[6] Concerning the injunction bond, the court ruled:

> The temporary injunction bond in the sum of $168,750, was filed to secure a money damage award emanating from the issuance of the temporary injunction. Injunctive relief is equitable, and, there will be de novo review. The defendant presented evidence that his damages exceeded $200,000. That monetary award could be increased, on de novo review, to an amount exceeding the amount of the present bond, including accrued interest. That bond is sacrosanct, and, there is no authority to employ it for an appeal bond.

By the time the court reduced the bond amount from $25,000 to $15,000, the plaintiff already had posted the $25,000 amount. The court refused the plaintiff's request for a refund of the excess amount.

The plaintiff contends the court's orders erroneously required it to post $183,750, an amount it contends exceeds the 110 percent provided for in Iowa Rule of Appellate Procedure 6.7 by $32,610. It seeks a reversal of the rulings and a refund of what it believes is excess. The defendant contends error is not preserved and the issue is moot.

The court's rulings that separate the money judgment for damages caused by the injunction from the attorney fee award in calculating the proper amount of the

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[5] $151,140 = ($125,000 + $12,400) x 110%

[6] The court used the attorney fee award of $12,400 plus interest as the starting point for calculating a supersedeas bond of 110 percent of the monetary judgment.

supersedeas bond confuse the issue. The plaintiff is correct that the entire judgment was for $137,400. A supersedeas bond of 110 percent would be $151,140. The plaintiff has posted $183,750. Although the court has the authority under the code to order an amount in excess of 110 percent, it did not base its order on that authority or on the considerations listed in section 625A.9(2). The plaintiff is correct in its calculation that the proper supersedeas bond amount is $151,140. We direct the clerk of court to refund the excess $32,610 to the plaintiff.

Misrepresentation Claim. On cross-appeal the defendant contends the court erred in dismissing his claim based on misrepresentation. He argues he signed the employment agreement that included the restrictive covenants based on misrepresentations made by M&F Livestock and Lawrence Parks. The district court concluded the damages claimed were duplicative of those from the harm caused by the injunction. The defendant claims his damages "were more than just those associated with being forced out of business." He seeks a remand for further proceedings on his claim, but, in the event the damage award based on the injunction is affirmed, does not seek a new trial. He admits the award of damages and attorney fees effectuates substantial justice between the parties and "taken as a whole the trial court should be affirmed."

The plaintiff argues the evidence does not support a finding of any misrepresentations made by M&F Livestock or Lawrence Parks or of any misrepresentations being the basis for the defendant signing the employment agreement. At trial, the defendant provided no evidence of any representations made by M&F Livestock or Lawrence Parks before he signed the employment agreement. He

testified the representations "came from people that I worked with for seven years and trusted a great deal." The district court correctly concluded this issue would not be submitted to the jury.

IV. Summary.

It does not appear that either party challenges the amount of damages or the attorney fee award. The defendant admits the damages awarded effectuate substantial justice between the parties. We affirm the district court's conclusion the restrictive covenants were unenforceable as written. We affirm the court's exercise of discretion not to reform the covenants. We modify the court's orders concerning the supersedeas bond and order the refund of $32,610 to the plaintiff. On cross-appeal, we affirm the district court's determination not to submit the misrepresentation claim to the jury.

Costs on appeal are taxed two-thirds to appellant and one-third to cross-appellant.

AFFIRMED IN PART AND MODIFIED IN PART ON APPEAL; AFFIRMED ON CROSS-APPEAL.