

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0161

EDWARD O. SMITH, JR.

VERSUS

CONAM INSPECTION AND ENGINEERING SERVICES, INC.,
MISTRAS GROUP, INC., EDGAR "JOE" CASSANOVA,
BILL MCDONOUGH, AND JIMMY QUAID

Judgment Rendered:

DEC 10 2014

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Suit number 97,434

Honorable Guy Holdridge, Presiding

Stephen M. Irving
Baton Rouge, LA

Counsel for Plaintiff/Appellee
Edward O. Smith, Jr.

and

Martin K. Maley, Sr.
Baton Rouge, LA

Robert L. Redfearn, Jr.
Susan F. Clade
Peter S. Thriffiley, Jr.
New Orleans, LA

Counsel for Defendants/Appellants
Conam Inspection & Engineering
Services, Inc. and Mistras Group, Inc.

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

GUIDRY, J.

Defendants/plaintiffs in reconviction, Conam Inspection & Engineering Services, Inc. (Conam) and Mistras Group, Inc. (Mistras), appeal from a trial court judgment which, despite finding that plaintiff/defendant in reconviction, Edward Smith, breached the non-competition and non-solicitation agreement with Mistras Group, Inc., awarded no damages. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On May 15, 2008, Conam entered into a purchase agreement with Smith to purchase assets of his company, Gonzales Industrial X-ray, Inc. (Gonzales). On the same date, and as part of the purchase, Conam and Smith entered into two additional agreements: 1) a consulting agreement¹ and 2) a non-competition and non-solicitation agreement. As part of the non-competition and non-solicitation agreement, Conam paid Smith \$400,000 for Smith's agreement not to, directly or indirectly, compete against Conam through any other company or solicit any Conam employees, customers, consultants, clients, or suppliers to terminate their employment or other business relationship with Conam or to establish any business relationship with Smith or any of Smith's affiliates for any business purpose that is competitive with Conam for a period of two years following the date of the agreement. Additionally, Smith agreed not to disparage the company or any of its products, services, or practices or any of its directors, officers, employees, agents, representatives, or affiliates or to divulge any confidential information during or after the term of the non-competition agreement.

Following the sale and execution of the foregoing agreement, Conam merged with Mistras on May 31, 2009, wherein Mistras became the surviving corporation.

¹ The consulting agreement is not at issue in the instant appeal.

Thereafter, on August 23, 2010, Smith filed a petition for damages against Conam, Mistras, and several Mistras employees alleging causes of action for breach of his consulting agreement, defamation, assault, and violation of the New Jersey Conscientious Employee Protection Act (CEPA). The defendants filed a dilatory exception raising the objection of vagueness. The trial court granted the defendants' exception and ordered Smith to amend his petition against the defendants within fifteen days.

After Smith filed an amended petition asserting the same causes of action as well as a cause of action for violation of the Louisiana Unfair Trade Practices Act, Conam and Mistras answered the amended petition and filed a reconventional demand against Smith for breaching his consulting agreement and his non-competition and non-solicitation agreement.

Following dismissal of Smith's CEPA claims against the individual employee defendants pursuant to a motion for partial summary judgment, the remaining claims, including those asserted in Conam and Mistras's reconventional demand, proceeded to a jury trial on July 17-18, 2013. On the first day of trial, the parties indicated that they had reached a settlement, which they entered into the record as follows: 1) Mistras will pay \$100,000 in settlement of the breach of the consulting agreement claim, defamation claim, and assault claim; 2) the remaining claims to be tried in this lawsuit would be Mistras's claim against Smith for breach of the non-competition and non-solicitation agreement and Smith's claim against Mistras for violation of CEPA; 3) the amount of awardable damages is capped at \$300,000; 4) any judgment in favor of Mistras and against Smith can be used as an offset against the \$100,000; and 5) Smith's claims for breach of the consulting agreement, assault, defamation, and violation of the Louisiana Unfair Trade Practices Act would be dismissed with prejudice against all named defendants.

Following trial on the two remaining claims, the jury returned a verdict finding that Smith had failed to prove his CEPA claim by a preponderance of the evidence. The jury also found that Mistras had proven by a preponderance of the evidence that Smith breached the non-competition and non-solicitation agreement, but the jury awarded \$0 in damages. The trial court thereafter signed a judgment in conformity with the jury's verdict. Conam and Mistras filed a motion for judgment notwithstanding the verdict, seeking an award of damages and costs for Smith's breach of the non-competition and non-solicitation agreement, which was denied by the trial court. Conam and Mistras now appeal from the trial court's judgments.

DISCUSSION

The non-competition and non-solicitation agreement at issue in the instant case required Smith to refrain from, directly or indirectly: competing against Mistras; soliciting any Mistras employees, consultants, customers, clients, or suppliers; using or divulging any confidential information; or disparaging Mistras and its employees. Mistras asserts on appeal that the record demonstrates that Smith violated all four aspects of the non-competition and non-solicitation agreement, and therefore, the jury erred in failing to award damages. However, from our review of the record, we find that the jury reasonably could have concluded, after considering the conflicting and circumstantial evidence before it, that Smith breached the non-competition and non-solicitation agreement only to the extent that he disparaged Mistras's employees, and that this breach did not result in any damage to Mistras.

Smith, as well as several former and current Mistras employees, testified at trial. Smith stated that when he sold the assets of Gonzales to Mistras, all of Gonzales's clients passed to Mistras. Smith also stated that he did not solicit employees to go work for Mistras's competitor, Capitol Ultrasonics, and that he

did not otherwise have anything to do with employees leaving Mistras and bringing their clients with them. In fact, as to two key Mistras employees, Smith stated that he offered these employees a retention bonus in an effort to get them to stay with Mistras, but that the two employees left before the expiration of the time to collect on the bonus. Additionally, Smith stated that although a Mistras employee, Lee Godbold, left the company with a laptop and a cell phone, these items were Godbold's personal property, and he had nothing to do with whether information was put on or taken off of Godbold's computer. Smith did, however, acknowledge that he called Bill McDonough, then general manager for Mistras, a liar because McDonough had called him a liar.

McDonough testified that Smith was confrontational with him and other Mistras employees, Smith called him a liar, and Smith complained about Mistras's rules. McDonough also stated that he was concerned about confidential information being leaked to competitors, because every time Mistras approached a client, Capitol Ultrasonics was right on their heels, which according to McDonough was very uncommon. McDonough stated that he never saw Smith speaking with Mistras employees prior to their departure from the company. Additionally, McDonough stated that Mistras's records reflect that three employees left Mistras because of corporate policies.

Jimmy L. Quaid and Jimmy R. Quaid, current Mistras employees, also testified at trial. Jimmy L. Quaid stated that Smith allowed Godbold to leave with confidential information on his laptop. He also stated that he saw Smith speaking with several of the employees before they left Mistras, and when he approached them, Smith and the employees stopped talking. Jimmy R. Quaid, also known at Mistras as "Pops," stated that Smith yelled and screamed at his employees and was known to be a liar. "Pops" also stated that Godbold used Mistras's drawings at Capitol Ultrasonics.

Finally, Caleb Foster, a former Mistras employee, testified that Smith talked to him about leaving Mistras and going to work for Capitol Ultrasonics on several occasions.

Under the manifest error standard, a court of appeal may not set aside a jury's finding of fact in the absence of manifest error or unless it is clearly wrong. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989); Landry v. Leonard J. Chabert Medical Center, 02-1559, p. 8 (La. App. 1st Cir. 5/14/03), 858 So. 2d 454, 463, writs denied, 03-1748, 03-1752 (La. 10/17/03), 855 So. 2d 761. Moreover, a jury's credibility determinations are entitled to great deference; thus, if the factfinder's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Riverside Recycling, LLC v. BWI Companies, Inc. of Texas, 12-0588, p. 4 (La. App. 1st Cir. 12/28/12), 112 So. 3d 869, 872-873. From our review of the record, and giving deference to the jury's credibility determinations and factual findings, we find that the jury reasonably could have concluded that Smith breached the non-competition and non-solicitation agreement only to the extent that he disparaged Mistras's employees.

Further, we likewise find no error in the jury's determination that Mistras suffered no damages as a result of this breach of the non-competition and non-solicitation agreement. The party bringing suit has the burden of proving any damages suffered by him as a result of a breach of contract. L & A Contracting Company, Inc. v. Ram Industrial Coatings, Inc., 99-0354, p. 20 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1223, 1235, writ denied, 00-2232 (La. 11/13/00), 775 So. 2d 438. In the instant case, Mistras presented evidence of the cost to hire and train new technicians to replace those employees who left Mistras to work for Capitol Ultrasonics and the amount of lost profits due to the loss of business to Capitol

Ultrasonics. However, the record does not demonstrate that either of these alleged damages resulted from Smith's breach of the non-competition and non-solicitation agreement by disparaging Mistras's employees.

Additionally, although Mistras paid Smith \$400,000 in consideration for the non-competition and non-solicitation agreement, the purpose of the agreement, according to Mistras, was to have Smith help Mistras build its business and preclude Smith from diverting Mistras's employees and customers to its competitors. There is no evidence in the record that this purpose was thwarted by Smith's calling McDonough a liar.

Therefore, based on our review of the record, we find no manifest error in the jury's finding that Mistras was not damaged as a result of Smith's breach of the non-competition and non-solicitation agreement. Likewise, we also find no manifest error in the trial court's failure to grant Mistras's request for a judgment notwithstanding the verdict. See Belle Pass Terminal, Inc. v. Jolin, Inc., 92-1544, 92-1545 (La. App. 1 Cir. 3/11/94), 634 So. 2d 466, 491-492, writ denied, 94-0906 (La. 6/17/94), 638 So. 2d 1094.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to Mistras and Conam.

AFFIRMED.