STATE OF MICHIGAN

COURT OF APPEALS

GRIGG BOX COMPANY,

Plaintiff-Appellant,

v

MICHIGAN BOX COMPANY, FONTANA FOREST PRODUCTS and ALAN GENTINNE,

Defendants-Appellees.

UNPUBLISHED
October 22, 2009

No. 285862
Wayne Circuit Court
LC No. 04-418211-CK

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment entered in its favor and against defendants, Michigan Box Company, Fontana Forest Products ("Fontana") and Alan Gentinne. We affirm.

Plaintiff first argues that the trial court erred in reforming a covenant not to compete between plaintiff and Gentinne, and in so doing, improperly limited plaintiff's damages claims. We disagree.

Non-compete agreements between employers and employees in Michigan are governed by MCL 445.774a. We review de novo both contract and statutory interpretation. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003); *Renny v Michigan Dept of Transportation*, 478 Mich 490, 495; 734 NW2d 518 (2007).

MCL 445.774a provides, in pertinent part:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Here, the trial court, acting under MCL 445.774a, limited the agreement between plaintiff and Gentinne, and then, also pursuant to MCL 445.774a, specifically enforced the agreement. We review the trial court's findings of fact for clear error, and its conclusions of law de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

The trial court limited the duration of the agreement to 18 months where the duration was originally three years, and further limited the agreement to prohibit Gentinne from actually selling, as opposed to merely soliciting the sale of, wooden boxes and pallets to plaintiff's exclusive customers within the 18-month period, in order to render the agreement reasonable. Following a bench trial on the issue of damages arising from Gentinne's breach of the agreement, which, according to the trial court, was induced by Fontana, the trial court awarded plaintiff $37,966, which represented plaintiff's financial expert, Ronald S. Longhofer's, quantification of plaintiff's lost profits arising from the breach of the agreement, as limited by the trial court.

Based on our review of the record, we find no error. The trial court did not clearly err in concluding that the three-year duration of the agreement was unreasonable, and further did not clearly err in concluding that the agreement was unreasonably restrictive in scope, and limiting the covenant not to compete in order to make it reasonable. MCL 445.774a; see also *Rory v Continental Ins Co*, 473 Mich 457, 475 n 32; 703 NW2d 23 (2005) (Noting that the Legislature has explicitly assigned the responsibility of assessing the reasonableness of noncompetition covenants between employers and employees to the judiciary). Having concluded that the agreement was unreasonable, the trial court properly exercised its authority under MCL 445.774a to limit the restrictive covenant between plaintiff and Gentinne to prohibit Gentinne from selling Fontana's wood products to plaintiff's exclusive customers for 18 months.

Plaintiff fails, or refuses, to acknowledge that the trial court properly exercised its power under MCL 445.774a in limiting the agreement, and advances its argument as if the trial court either did not have statutory authority to do so, or despite having the authority, failed to do so. Under these circumstances, we find unpersuasive plaintiff's argument that the trial court erroneously inserted a "damages cap" into the contract between plaintiff and Gentinne. The trial court did not impose a "damages cap," but rather limited the agreement to prohibit Gentinne from making actual sales to plaintiff's customers during the 18-month period in order to make the agreement reasonable under the circumstances. MCL 445.774a. Only if the agreement had not been reformed would the trial court's award of $37,966 in damages constitute a "damages cap," and further, only if the trial court did not limit the agreement to prohibiting Gentinne from selling to plaintiff's exclusive customers during the 18-month protected period would plaintiff be entitled to pursue his remedies for further breaches.

Additionally, contrary to plaintiff's argument, the trial court did not limit plaintiff's ability to present its entire damages case. Nothing in the record demonstrates that the trial court precluded plaintiff from arguing that it was entitled to $415,924.01, and this figure, along with Longhofer's report, was presented to and considered by the trial court. Although plaintiff argues that "there is no precedent limiting [plaintiff]'s ability to present its entire damages case," we observe that plaintiff presents no precedential authority supporting its position that it is entitled to damages in excess of the amount of lost profits calculated by Longhofer in accordance with the covenant not to compete as limited by the trial court. Plaintiff correctly states that damages

recoverable for breach of contract "are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made," and argues that under this rule it is entitled to recover its lost profits. However, plaintiff fails to acknowledge that the trial court did, in fact, award plaintiff lost profits, adopting the amount of damages, including lost profits, as calculated by Longhofer, that conformed to the covenant not to compete, as limited. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980).

With respect to plaintiff's argument that it is entitled to damages arising from Gentinne's solicitation of plaintiff's customers during the 18-month protected period, plaintiff fails to cite any authority to support this contention. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority to either sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Further, plaintiff's argument, premised entirely upon a hypothetical, underscores the speculative and conjectural nature of the damages allegedly arising from improper solicitation to which it claims to be entitled. Cf. *Allen v Michigan Bell Telephone Co*, 61 Mich App 62, 68-69; 232 NW2d 302 (1975) (restating the longstanding principle of contract law that although damages for lost profits are awardable in breach of contract cases, it is necessary to prove the calculation of the profits lost with a reasonable degree of certainty, and such damages are not awardable if they are conjectural and speculative).

Plaintiff next argues that the trial court improperly restricted the scope of discovery when it denied plaintiff's motion to compel discovery, where plaintiff sought Fontana's "total sales figures." We disagree. This Court reviews a trial court's decision with respect to a motion to compel discovery for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

MCR 2.302(B)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence.

However, a trial court may limit discovery to relevant issues. *Charter Twp of Bloomfield v Oakland Co Clerk*, 253 Mich App 1, 35-36; 654 NW2d 610 (2002). In its brief on appeal, plaintiff identifies the discovery the trial court precluded it from seeking as, the "total sales figures from Fontana." According to plaintiff, obtaining Fontana's "total sales figures" was necessary in order for plaintiff to calculate its own lost profits. Significantly, plaintiff does not

contend that Michigan Box Company, Fontana or Gentinne failed to disclose any documents or things relating to whether Gentinne breached, or whether Fontana induced Gentinne to breach, the agreement, as limited by the trial court. In fact, plaintiff tacitly admits that by seeking Fontana's "total sales figures," it went beyond the scope of the relevant issues when it argues on appeal that the trial court improperly limited the scope of relevant issues, and not that the discovery was relevant to the issues as limited by the trial court.

Plaintiff correctly argues that the relevant issues in this case, and thereby the scope of discovery, were delineated by the trial court when the trial court limited the covenant not to compete pursuant to its authority under MCL 445.774a, and this issue is inextricably linked to the trial court's ruling regarding its limitation of the covenant not to compete. However, the trial court did not err when it limited the covenant not to compete regarding the duration and scope of the agreement. As such, we conclude that because plaintiff does not assert that any defendant precluded it from obtaining discovery relating to the allegation that Gentinne breached the agreement, as limited by the trial court, and the trial court properly limited the covenant not to compete in order to render it reasonable, and specifically enforced the agreement as limited, plaintiff's argument, that it was entitled to pursue discovery relating to issues outside the scope of the litigation, fails. MCL 445.774a; *Charter Twp, supra*.

Plaintiff next argues that the trial court erred when it failed to enter judgment for plaintiff on the basis of plaintiff's expert opinion regarding the amount of damages. We disagree. As before, we review the trial court's findings of fact for clear error, and its conclusions of law de novo. *Glen Lake-Crystal River Watershed Riparians, supra*.

"It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Here, in the trial court, plaintiff submitted Longhofer's initial report, which summarized his opinion with respect to plaintiff's damages as follows:

> 1. Within the limits of the Order, the total value of damages resulting from the alleged misconduct of Defendants as of June 24, 2007 is $60,068.
>
> 2. The total value of damages including potential future lost profits resulting from lost client relationships as of June 24, 2007 is $329,600.

Plaintiff subsequently submitted a revised report, which summarized Longhofer's calculations as follows:

> 1. Excluding sales to the three Disputed Customers, the total value of damages resulting from the misconduct of defendants as of June 24, 2007 is $37,966.
>
> 2. Excluding sales to the three Disputed Customers, the total value of damages including potential future lost profits resulting from lost client relationships as of June 24, 2007 is $207,380.

Michigan Box Company and Fontana argued that plaintiff was entitled to recover nothing, or in the alternative, no more than $4,799.91, which represented five percent of the $94,992.29 in Gentinne's sales to plaintiff's exclusive customers during the 18-month protected period.

The trial court did not clearly err when it rejected Michigan Box Company and Fontana's request that it award no more than $4,799.91 and adopted plaintiff's expert's quantification of plaintiff's damages for breach of the covenant not to compete as limited by the trial court. We observe that the only case cited by plaintiff in support of its entire argument, *Pryomski v Michal Enterprises*, 343 F Supp 2d 645, 648 (ED Mich, 2004), stands, according to plaintiff, for the proposition that a "[p]arty's failure to rebut expert testimony resulted in summary judgment for opposing party," and here, the amount of the trial court's award, $37,966, was a product of plaintiff's expert report. Plaintiff has cited no authority in support of what we perceive as its actual argument, that if a party fails to rebut a quantification of damages, the trier of fact must select the higher of the two amounts submitted by the proponent's expert.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro