STATE OF MICHIGAN

COURT OF APPEALS

CUMULUS BROADCASTING LLC,

Plaintiff-Appellant,

v

MARK KEADY (a/k/a JAY DEACON) and WARREN KLUCK,

Defendants-Appellees.

UNPUBLISHED
April 29, 2010

No. 290112
Kent Circuit Court
LC No. 2008-009920-CK

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court order dismissing its case with prejudice pursuant to MCR 2.116(I)(2). Because existing questions of material fact preclude summary disposition in defendants' favor, we reverse and remand.

Plaintiff operates radio stations in Kalamazoo County, including WRKR FM. Defendants were on-air radio personalities employed by plaintiff at the above station beginning in approximately December 2005. According to plaintiff, as terms of their employment, defendants signed an agreement providing that during their employment with plaintiff, and for six months thereafter, they would not compete with plaintiff within a specified "business area." Despite the agreement, defendants left plaintiff's employ in July 2008 and immediately began working for one of plaintiff's competitor radio stations, allegedly located within the defined "business area." Plaintiff initiated the instant action alleging that defendants breached the terms of the non-compete clause. Plaintiff sought to enforce the non-compete provision and also sought a preliminary injunction.

In response, defendant Kluck asserted that his employment contract with plaintiff expired, by its own terms, in December 2007. Kluck asserted that since the contract expired on December 31, 2007, and he did not begin working for the competing radio station until six months after the contract ended, the non-compete provision had expired at the time he began his new employment. Kluck further asserted that if the non-compete clause were somehow applicable, he did not engage in business activities within the "business area," defined in the agreement as the area within a 60-mile radius of plaintiff's radio transmitter. Defendant Keady responded in a similar manner, arguing that his contract had expired and that he was working outside the geographic area subject to the non-compete agreement, such that plaintiff was not

likely to succeed on the merits and could not establish the irreparable harm necessary to warrant a preliminary injunction.

A hearing on plaintiff's motion for preliminary injunctive relief was held on November 7, 2008. No witnesses testified at the hearing but, after the parties made their respective arguments, the trial court concluded that not only was a preliminary injunction unnecessary, that under MCR 2.116(I)(2), summary disposition was appropriate in defendants' favor. According to the trial court, the parties' contracts expired on December 31, 2007, and defendants did not begin working for a competing radio station until more than six months after the employment contracts had expired. The trial court also determined that defendants' new employment was located more than 60 miles from plaintiff's radio transmitter, thus holding that:

> There was no enforceable employment provision which bars the present employment of the parties defendant. This case clearly had, in my opinion, no legal basis to justify the relief sought; and, therefore, it is dismissed.

An order, dismissing plaintiff's complaint with prejudice, "for the reasons stated on the record," was entered December 15, 2008. This appeal followed the trial court's denial of plaintiff's subsequent motion for reconsideration and for relief from judgment.

On appeal, plaintiff contends that the trial court erroneously converted a motion for preliminary injunction into a motion for summary disposition, thereby precipitously dismissing plaintiff's complaint without notice of the altered standard or providing plaintiff an opportunity to present its proofs. Plaintiff further asserts that the contractual provisions relied upon by the trial court in rendering its decision, at a minimum, present factual questions that would preclude summary disposition in defendants' favor.

We review a trial court's decision concerning injunctive relief for an abuse of discretion. *Mich Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). Here, the trial court not only denied plaintiff's motion for a preliminary injunction, but also sua sponte granted summary disposition in defendants' favor. Summary disposition decisions are reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). In the instant matter, it appears that the trial court granted summary disposition under MCR 2.116(C)(10) because the court relied on documentary evidence, specifically the parties' contracts. A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under MCR 2.116(C)(10), a court reviews all of the affidavits, pleadings, and other evidence in the light most favorable to the nonmoving party. *In re Smith Trust*, 274 Mich App 283, 284-285; 731 NW2d 810 (2007).

In addition, this case involves the interpretation of a contract. The proper interpretation of a contract is a question of law that this Court reviews de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

Under MCR 3.310(A)(4), at a hearing on an order to show cause as to why a preliminary injunction should not issue, "the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued . . ." A moving party bears the burden of proving,

and the trial court must evaluate, whether four factors favor the issuance of a preliminary injunction: (1) the moving party made the required demonstration of irreparable harm, (2) whether the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) whether the moving party showed that it is likely to prevail on the merits, and (4) any harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008).

In the instant matter, the trial court did not directly address each of the four elements necessarily considered in a preliminary injunction request. The trial court, instead, focused exclusively on defendants' contentions that they did not begin working for another radio station until more than six months after their employment contracts with plaintiff had expired, and that their new employer was located more than sixty miles from plaintiff's radio transmitter. In making its decision to grant summary disposition in defendants' favor, the trial court obviously found that, on its review of the parties' contracts, plaintiff was not likely to prevail on the merits. Our review must necessarily begin with an analysis of the trial court's interpretation of the parties' contracts.

At the outset, we question the propriety of the trial court's sua sponte grant of summary disposition, although we are mindful of its authority to do so, even absent a motion under MCR 2.116(C). See MCR 2.116(I); *Boulton v Fenton Twp*, 272 Mich App 456, 462-464; 726 NW2d 733 (2006). Despite this authority, due process protections apply to civil litigation. The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). Here, the decision granting summary disposition in defendants' favor was issued approximately two months after the case was initiated, at a hearing on plaintiff's motion to show cause why a preliminary injunction should not issue. The trial court gave no notice that it would be considering summary disposition at that time and took no testimony at the hearing, though at least one witness was presented as available to testify. We thus harbor serious doubts as to whether the basic requirements of notice and a meaningful opportunity to be heard have been satisfied in this case. Even if we assume, without deciding, that there was no procedural error in granting summary disposition, we next turn to whether summary disposition was appropriate based upon the record before the trial court.

"The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). If contractual language is clear and unambiguous, its meaning is a question of law, and courts must interpret and enforce the contract as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). However, if contractual language is ambiguous, its meaning is a question of fact for the jury to decide. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). A contract is ambiguous if the words may reasonably be understood in different ways or if the provisions irreconcilably conflict with each other. *Id.* at 467.

The relevant contractual provisions at issue here provide as follows:

> 7. AGREEMENT NOT TO COMPETE. While employed by the Company, and for 6 months following termination of such employment,

> Employee shall not directly or indirectly, within the Business Area, for any Competing Business, engage in any activities the same or essentially the same as Employee's Job Duties . . .

Defendants argued, and the trial court agreed, that because the contractual employment periods expired on December 31, 2007, and defendants did not begin working for plaintiff's competitor until July 2008, they were not in violation of the above provision. However, the express contract language provides that defendants are not to compete with plaintiff for a period of six months *following employment with the company*—not following termination of the employment *agreement*.

Notably, references are made throughout the contracts to the "Employment Period," identified in the contracts at Section 3 as commencing on December 1, 2005, in defendant Kluck's case and on January 1, 2006, in defendant Keady's case, and continuing until December 31, 2007. Section 7, containing the non-compete provision does not, however, reference the "Employment Period", but references the much broader term "employment." In contrast, another contractual provision, found at Section 3.3 provides, in part, that:

> During the last thirty (30) days of the Employment Period and for a period of six (6) months after the termination of the Employment Period, employee shall not enter into the employment of . . . .or from any person or entity engaged in a Competing Business, unless and until Employee has first promptly disclosed the terms thereof to Company and offered in writing to enter into an employment agreement with the Company on terms which are substantially similar to those of any bona fide offer which Employee has received. . .

To the extent that the above provision can be interpreted as a non-compete clause, it conflicts with section 7 of the agreements and is thus ambiguous.

Defendants both undisputedly continued in plaintiff's employ until July 2008. Given the language contained in Section 7 of the agreements, a reasonable argument could be made that defendants agreed not to compete until six months after they ended their actual employment with plaintiff (in July 2008), and that they violated this agreement by beginning employment with plaintiff's competitor mere days after they left plaintiff's employ. At a minimum, a question of fact is presented concerning the interpretation of this contract provision, thus precluding summary disposition.

The fact that the agreements had expired six months prior to defendants terminating their employment with plaintiff appears to be of no consequence. The parties' contracts specifically provide:

> 10. SURVIVABILITY. The Following Sections/provisions shall survive termination of this Agreement and Employee's employment thereunder. . . Sections 3.1, 3.2, 3.3, 6, 7, 8,9, 11, 12, 13, 15, 16, 18, and this Section 10.

Regardless of whether the agreement terminated, Section 7 of the agreement providing that defendants may not compete with plaintiff for six months following the termination of their

employment with plaintiff, remained in effect. The trial court thus erred in entering summary disposition in defendants' favor on the basis of the employment contracts' expiration.

The trial court also found summary disposition appropriate based upon its determination that defendants' new employer was not located in the "business area" as defined in the non-compete clause. As previously indicated, Section 7 of the parties' agreements prohibited defendants from competing with plaintiff for a six month period following termination of their employment with plaintiff, limiting such competition to that located within the "Business Area." "Business Area" is defined in the contracts, at Section 1.2, as "a radius of 60 miles from the Company's radio transmitter currently located at 14696 V. Ave East, Fulton, MI. . ."

At the hearing on plaintiff's motion for a preliminary injunction, plaintiff's counsel was directly asked whether the radio tower of defendants' new employer was more than 60 miles from plaintiff's radio transmitter. Counsel replied that it was. When the trial court indicated a belief that the location was therefore beyond the scope of the non-compete clause, counsel disagreed, indicating that the issue is not whether the towers are more than 60 miles apart, but whether the business competes within a 60 mile radius of plaintiff's tower. According to plaintiff, the competing employer does, in fact, broadcast within a 60-mile radius of its tower, so that that defendants are competing in the contemplated "business area."

The non-compete clause specifies that for the six-month period following defendants' termination of employment, they "shall not directly or indirectly, within the Business Area, for any Competing Business, engage in any activities the same or essentially the same as Employee's Job Duties . . ." As "business area" is defined in the contracts as "a radius of 60 miles from the Company's radio transmitter," if defendants, directly or indirectly, engaged in any activities that were essentially the same activities they performed for plaintiff within a 60 mile radius of plaintiff's transmitter, they could be found to have breached the non-compete provision. This proves problematic because, due to the unique nature of radio broadcasting, one's mere physical presence beyond a 60 mile radius from plaintiff's tower does not necessarily mean that the activities engaged in by radio personalities would not or could not be found to occur in that 60 mile radius.

It is unclear from the contract language whether the parties' intended the non-compete clause to limit defendants from competing with a business physically located within 60 miles of plaintiff's transmitter, or whether they intended that the 60-mile radius incorporate the broadcast area of the competing station. Additionally, the non-compete clause precludes defendants from directly or indirectly competing within the 60-mile radius. Whether a radio broadcast's transmission into a specific business area can be construed as indirect competition within that area is unclear. As such, the contracts are subject to conflicting interpretation and summary disposition was thus inappropriate. Summary disposition not having been warranted, the next question is whether the trial court abused its discretion in denying plaintiff's motion for a preliminary injunction.

As previously indicated, four factors are to be considered in a preliminary injunction request: (1) whether the moving party demonstrated irreparable harm if the injunction were not issued, (2) whether the harm to the moving party would outweigh the harm to the adverse party, (3) whether the moving party showed that it is likely to prevail on the merits, and (4) any harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n, IAFF Local 344*, 482

Mich at 34. Again, the trial court does not appear to have considered any factor other than (3), above. Absent a record, this Court is unable to adequately review the trial court's determination on the preliminary injunction issue.

While defendants offer various other bases on which to affirm the trial court's decision, the trial court did not address any of these arguments. This Court's review is limited to issues actually decided by the trial court. *Lowman v Karp*, 190 Mich App 448, 454; 476 NW2d 428 (1991). Because the trial court never reached these issues, this Court need not address them. *Schubiner v New England Ins Co*, 207 Mich App 330, 331; 523 NW2d 635 (1994).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering