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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0175

Wells Fargo Insurance Services USA, Inc.,
Appellant,

vs.

Angelo Galioto, et al.,
Respondents.

Filed September 16, 2019
Reversed and remanded
Smith, John, Judge*

Hennepin County District Court
File No. 27-CV-17-17361

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Considered and decided by Connolly, Presiding Judge; Hooten, Judge; and Smith, John, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SMITH, JOHN, Judge

We reverse the district court's grant of summary judgment in favor of respondent Angelo Galioto, et al., because the restrictive covenant signed by Galioto was ancillary to new employment and did not require independent consideration. We remand for further proceedings on issues not decided by the district court.

FACTS

In March 1999, respondent Angelo Galioto began working as an insurance producer for W.A. Lang Co. (W.A. Lang). When he was hired by W.A. Lang, Galioto signed an employment agreement, which contained a restrictive covenant. The W.A. Lang restrictive covenant provided:

> In consideration of your employment with the Company, you agree that, if your employment should terminate for any reason, you will not, at any time, during the period of two years after such termination,
>
> . . . .
>
> (b) In any capacity, (whether as an employee, officer, consultant, or otherwise) sell, solicit, accept, receive, service or transact any Insurance Business which we have offered or provided to any person or entity who was a Company Customer at any time during the eighteen (18) month period ending with the date of termination of your employment with the Company.

In December 1999, W.A. Lang announced that it would be selling most of its assets to Acordia of Minnesota, Inc. (Acordia). After announcing the sale, the CEO of W.A. Lang assured the employees that their jobs would be safe; he told the insurance producers that

after W.A. Lang and Acordia made their final agreements, Acordia would extend offers of employment to them under terms similar to those in W.A. Lang's employment agreement.

On January 13, 2000, W.A. Lang entered into a purchase agreement to sell all or substantially all of its assets to Acordia. The purchase agreement provided that, as of the closing, Acordia "will make offers of immediate employment to all employees of [W.A. Lang]." It additionally stated that W.A. Lang would:

> sell, assign, transfer and convey, at the Closing . . . [a]ll restrictive covenants and similar rights owned or possessed by [W.A. Lang] including, without limitation, the right to enforce the restrictive covenants in any . . . employment agreements between [W.A. Lang] and its employees, to the extent transferable or assignable which agreements or employment contracts are not assigned by [W.A. Lang] to Acordia.

While the asset purchase closed on January 13, the purchase agreement specifically provided that the effective closing date was retroactive to January 1, 2000.

On the morning of January 14, Galioto received an email from W.A. Lang's CEO stating:

> The closing with Acordia was successfully completed last night as scheduled. Beginning today, we will be answering the phones identifying ourselves as W.A. Lang/Acordia.
>
> One issue that needs to be dealt with today is signing employment agreements. Acordia has issued payroll checks which are contingent upon your accepting their offer of continued employment. Yesterday, a draft copy of the agreement was distributed to those who were here in the afternoon. No changes were required so we will be using the draft as the final document. Upon receipt of your signed agreement, [a representative] has been authorized by Acordia to provide you with your check.

At some point on January 14, Galioto received Acordia's employment agreement. The employment agreement contained a restrictive covenant that was very similar to the restrictive covenant in W.A. Lang's employment agreement. It provided:

> In consideration of your employment with [Acordia], you agree that, if your employment should terminate for any reason, you will not, at any time, during the period of two (2) years after such termination,
>
> . . . .
>
> (b) In any capacity, (whether as an employee, officer, consultant or otherwise) sell, solicit, accept, receive, service or transact any Insurance Business which [Acordia] or W.A. Lang Co. offered or provided to any person or entity who was a Company Customer at any time during the eighteen (18) month period ending with the date of termination of your employment with the Company.

Acordia's employment agreement also contained a retroactive provision which provided that Galioto's employment with Acordia commenced on January 1, 2000.

Through a series of corporate transactions from 2001 to 2010, Acordia Minnesota became "rolled up" into Wells Fargo Insurance Services USA, Inc. Galioto continued to work for Acordia, and ultimately its successor, appellant Wells Fargo Insurance Services USA, Inc. (WFIS) from January 2000 until his resignation on May 10, 2017.

Shortly after his resignation, Galioto began his employment with respondent Kansas City Series of Lockton Companies (Lockton). WFIS alleges that Galioto is responsible for 24 accounts moving their business from WFIS to Lockton because he contacted them after his resignation.

On November 16, 2017, WFIS served its summons and complaint upon Galioto and Lockton, asserting claims of: (1) breach of contract by Galioto, (2) breach of duty of loyalty

by Galioto, (3) misappropriation of trade secrets by Galioto, and (4) and (5) tortious interference with a contract by Lockton and Galioto. WFIS voluntarily dismissed the duty of loyalty and misappropriation claims. WFIS filed a motion for partial summary judgment on its claim of breach of contract. Galioto and Lockton filed a cross-motion for summary judgment, seeking dismissal with prejudice of WFIS's breach-of-contract claim and tortious-interference claim.

On September 6, 2018, the district court held a hearing on the motions for summary judgment. WFIS argued that the Acordia employment agreement was enforceable and Galioto was liable to WFIS for violating the restrictive covenant. Galioto and Lockton argued that the employment agreement lacked consideration and was overly broad, WFIS lacked standing, and the restrictive covenant had expired. The district court determined that the restrictive covenant within Acordia's employment agreement was unenforceable because it lacked consideration. Because it was unenforceable, the district court granted summary judgment in favor of Galioto and Lockton on both claims and dismissed WFIS's complaint with prejudice. The district court did not consider the remaining arguments made by Galioto and Lockton. WFIS appeals.

D E C I S I O N

On appeal from summary judgment, this court reviews de novo "whether there are any genuine issues of material fact and whether the district court erred in its application of the law to the facts." *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). We therefore review de novo the district court's legal determinations regarding consideration. *See Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App.

1998) ("Determining whether sufficient consideration exists for an agreement is a question of law."), *review denied* (Minn. Jan. 27, 1999).

I. The district court erred by determining that the restrictive covenant lacked consideration.

The district court determined that the restrictive covenant in the Acordia agreement was unenforceable because it was not supported by consideration. The district court found that the restrictive covenant lacked consideration because: (1) it was presented to Galioto after his employment with Acordia commenced, (2) Galioto's first paycheck from Acordia did not constitute independent consideration, and (3) the release from the restrictive covenants in the W.A. Lang agreement did not constitute independent consideration. WFIS argues that the district court erred in these determinations because the restrictive covenant was ancillary to Galioto's new employment with Acordia and the retroactivity provision did not negate the new employment. We agree.

A. The restrictive covenant was ancillary to Acordia's offer of new employment.

"In order to be enforceable, non-compete agreements must be reasonable and supported by consideration." *Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660, 667 (Minn. App. 2009) (quotation omitted). Restrictive covenants that are ancillary to an employment contract are supported by consideration. *See Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. App. 1993) (noting that where a restrictive covenant is not ancillary to new employment, it must be supported by independent consideration to be enforceable). "When the employer fails to inform prospective employees of noncompetition agreements until after they have accepted jobs, the employer takes undue advantage of the inequality

between the parties," thus independent consideration is necessary. *Id*. (quotation omitted). The district court determined, and Galioto contends, that the restrictive covenant was presented to Galioto after he was employed by Acordia and thus needed independent consideration. WFIS argues that the restrictive covenant in the Acordia agreement was ancillary to new employment. In order to evaluate whether the restrictive covenant was supported by consideration, we must first determine whether Acordia's employment agreement was an offer of new or continued employment.

Neither party disputes the facts. On January 13, 2000, W.A. Lang and Acordia signed a purchase agreement, which provided that W.A. Lang would "sell, assign, transfer, and convey, at the Closing, absolutely to [Acordia] . . . its entire business and certain of its properties and assets." Although the parties entered into this agreement on January 13, the document provided that the transaction "is made and entered into as of the 1st of January, 2000." At 7:59 a.m. on the morning of Friday, January 14, 2000, Galioto received an email from the CEO of W.A. Lang, which provided:

> The closing with Acordia was successfully completed last night as scheduled. . . .
>
> One issue that needs to be dealt with today is signing employment agreements. Acordia has issued payroll checks which are contingent upon your accepting their offer of continued employment. . . . Upon receipt of your signed agreement, [a representative] has been authorized by Acordia to provide you with your check."

Later that same day, Galioto received a copy of the employment agreement referenced in the email. The agreement contained a restrictive covenant. The agreement also contained a retroactive provision which provided that Galioto's employment with Acordia

commenced on January 1, 2000. Galioto worked the entire day on January 14 without signing the agreement. Following the Martin Luther King Jr. holiday, Galioto signed and returned the agreement on Tuesday, January 18. After executing the agreement, Galioto received his paycheck for the preceding two weeks.

WFIS argues that Galioto was offered new employment with Acordia on January 14, and therefore the restrictive covenant was ancillary to his new employment and did not require independent consideration. Galioto contends that the clear and unambiguous terms of the employment agreement provided that Galioto became an employee of Acordia on January 1. Thus, because the employment agreement was not provided to him and executed prior to January 1, the agreement was not ancillary to new employment and required independent consideration.

The district court found that Galioto's employment with Acordia commenced on January 1 based on the language in the employment agreement and because Acordia "took affirmative actions consistent with the position that Galioto's effective start date was January 1." The affirmative actions the district court cited to included: (1) Acordia paid Galioto his earnings as of January 1, (2) Acordia made Galioto eligible to participate in benefit programs as of January 1, (3) Acordia benefited from Galioto's work as of January 1, and (4) the CEO of W.A. Lang presented the employment agreement as an offer of continued employment. Galioto relies on the district court's reasoning, and also argues that there was no material change in his employment—such as an increase in compensation—which bolsters the position that the agreement was not an offer of new

employment but continued employment, requiring independent consideration for the restrictive covenant.

WFIS argues that the district court erred in determining that the retroactivity provision suggests that Galioto commenced employment with Acordia on January 1. WFIS contends that "the fundamental problem with the district court's analysis is that it uses the *signed* employment agreement to prove that Galioto was employed by Acordia on January 1 and thus received nothing of value when the employment agreement was *offered* on January 14."

In its argument, WFIS relies on our decision in *Softchoice*. In that case, an employee interviewed for a promotion within the company on January 7. *Softchoice*, 763 N.W.2d at 664. Later that same day, the employee was informed via email that he received the promotion and would soon receive a "formal offer." *Id.* On January 16, Softchoice sent the employee a formal offer letter that also contained a non-solicitation agreement. *Id.* at 665. The offer letter retroactively set the promotion's effective date for January 2. *Id.* The employee signed the letter, continued working for Softchoice, but quit approximately one year later and violated the non-solicitation agreement. *Id.* Softchoice sought an injunction against the employee, and the employee argued that his promotion could not serve as consideration for the non-solicitation agreement because the promotion occurred on January 7, and he received the agreement after this date. *Id.* at 667-68. We rejected the employee's argument and held that "a promotion serves as consideration for a non-compete agreement at the time when the terms of the promotion have been defined and the promotion has been formally offered and accepted in writing." *Id.* at 668. "It was only

after [the employee] signed the offer letter containing the terms of his new position and the non-solicitation agreement that he received any 'real advantages' from Softchoice." *Id.* at 669. Thus, the agreement was supported by consideration—specifically the employee's promotion.

Galioto and the district court distinguish *Softchoice* from this case because the employee was offered increased pay and benefits contingent upon signing the non-solicitation agreement, whereas here, Galioto was not offered any increase in pay or promotion. However, as WFIS points out, Galioto never would have received the benefit of something he was not entitled to—employment with Acordia—had he not signed the employment agreement containing the restrictive covenant. Galioto only received the "real advantages" from Acordia upon signing the employment agreement. Any retroactivity does not factor into the analysis, as Galioto only gained any benefits from employment with Acordia, such as being retroactively employed or retroactively receiving benefits, after signing the agreement.

Galioto additionally argues that the employment agreement constituted continued employment because he received the email on the morning of January 14 notifying him of an employment relationship with Acordia, but he did not receive the employment agreement containing the restrictive covenant until later that afternoon, after he had worked a few hours. *Cf. Midwest Sports Mktg., Inc. v. Hillerich & Brandsby of Can., Ltd.*, 552 N.W.2d 254, 265-66 (Minn. App. 1996) (holding that noncompetition agreement failed for lack of consideration after company presented employee with agreement two weeks after beginning work), *review denied* (Minn. Sept. 20, 1996). But the January 14 email clearly

stated that Galioto must sign the employment agreement to accept Acordia's offer of employment. And Galioto received that employment agreement later that same day. We are not convinced that this situation is analogous to cases where an employee worked for a company for weeks before receiving a noncompetition agreement. *Cf. Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 132-33 (Minn. 1980) (determining that noncompetition agreement lacked consideration when employee was not presented with agreement until 11 days after his first day and there was no independent consideration).

In sum, Acordia made an offer of new employment on January 14 and the restrictive covenant was ancillary to that offer, regardless of any retroactivity provision. Therefore, the district court erred by determining that the restrictive covenant lacked consideration. Because the restrictive covenant was ancillary to new employment, we do not address the parties' arguments regarding independent consideration.

II. This court must remand for further proceedings.

WFIS argues that this court should enter summary judgment in its favor and against Galioto. However, because the district court found that the Acordia employment agreement containing the restrictive covenant lacked consideration and was unenforceable, it did not address Galioto's and Lockton's alternative arguments for summary judgment. Those remaining arguments include: (1) that the restrictive covenants are overbroad, unreasonable, and unenforceable; (2) that USI Insurance Services National, Inc. (which brings this lawsuit in the name of WFIS) lacks standing, following numerous mergers, acquisitions, and name changes, to enforce the two-decades-old agreement; and (3) that

under the plain language of the Acordia employment agreement, the restrictive covenants have long since expired.

WFIS argues that these three arguments involve only legal issues and can be decided by this court rather than the district court. Although the three other arguments Galioto made for summary judgment involve legal arguments, the arguments require significant analysis of the record and fact finding, particularly in determining the reasonableness of the restrictive covenant. *See Satellite Indus., Inc. v. Keeling*, 396 N.W.2d 635, 640 (Minn. App. 1986) ("Ascertaining whether a non-competition agreement is reasonable in scope calls for a balance of the equities between the employee and his former employer."), *review denied* (Minn. Jan. 21, 1987); *see also Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 87-88 (Minn. App. 1985) ("[I]t is not within the scope of our review to make the essentially factual finding of whether the covenant was reasonable.").

We therefore reverse and remand to the district court for further proceedings on Galioto's and WFIS's remaining arguments. We additionally remand to the district court WFIS's claim against Lockton for tortious interference, as the district court dismissed this claim based solely on its determination that the restrictive covenant lacked consideration.

Reversed and remanded.