STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0413

Tenant Construction, Inc.,
Respondent,

vs.

Scott H. Mason,
Appellant,

Mosborg Ventures LLC, et al.,
Defendants.

Filed February 5, 2008
Affirmed
Crippen, Judge*

Hennepin County District Court
File No. 27-CV-05-18552

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Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Crippen, Judge.

* 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

CRIPPEN, Judge

Appellant Scott Mason questions whether the district court's order and judgment prohibiting him from violating a noncompete agreement is supported by the record. We affirm.

FACTS

Appellant worked for respondent Tenant Construction, Inc. from June 2004 until September 2005. Respondent is a commercial-building contractor focusing on the construction of retail stores, principally in Hennepin County. Appellant served as the "Director of Construction," a role that required, among other things, that he supervise respondent's construction projects, develop new business opportunities, and communicate with customers.

After six months of this employment and for added consideration of $500, appellant signed a "Non-Competition, Non-Solicitation and Confidentiality Agreement." Respondent's president also told appellant that his continued employment was conditioned upon execution of a noncompete agreement. In the document, appellant agreed not to work for "a business similar to or competing with [respondent's] business" in the Twin Cities metropolitan area for 12 months after his employment ended. He also agreed to not solicit respondent's customers or disclose its confidential information during the 12-month period.

At some time after his employment began, appellant sought respondent's approval to serve on the board of directors of Mosborg Ventures, LLC. Conditioned upon

appellant's limited involvement with Mosborg, respondent's president agreed to the request. Mosborg, which is located in Hennepin County, is "engaged in the business of real estate construction and development management and leasing."

In mid-September 2005, after receiving an offer of employment from Mosborg to serve as its "Vice President of Development and Construction," appellant submitted his resignation from respondent and accepted the offer. Appellant's duties at Mosborg resembled those he had with respondent, including supervision of construction projects, development of new business opportunities, and communication with suppliers and customers.

In December 2005, respondent sued appellant and Mosborg for, among other things, breach of contract and tortious interference with a contract. The district court subsequently granted a temporary injunction that prohibited appellant from working for Mosborg or any other competitor until September 2006. Based on the court's condition, respondent posted a $75,000 cash bond.

The district court's subsequent partial summary judgment made the injunction permanent through September 2006, upheld respondent's breach-of-contract claim against appellant, awarding $14,000 liquidated damages, and upheld respondent's tortious-interference claim against Mosborg. Respondent's remaining claims were subsequently dismissed on a stipulation of the parties. Following another hearing, the district court awarded respondent $19,000 in attorney fees.

D E C I S I O N

1. Temporary injunction

Appellant first claims that the district court abused its discretion by granting the temporary injunction.[1] *See Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81, 91 (Minn. 1979) (applying abuse of discretion standard of review). In a temporary injunction, the court abuses its discretion if it "disregards either the facts or the applicable principles of equity." *First State Ins. Co. v. Minn. Mining & Mfg. Co.*, 535 N.W.2d 684, 687 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Oct. 18, 1995). This court reviews the facts alleged in the pleadings and the affidavits "as favorably as possible to the party who prevailed" in the district court. *Hvamstad v. City of Rochester*, 276 N.W.2d 632, 633 (Minn. 1979).

Although appellant appears to have otherwise conceded the reasonableness of the noncompete agreement, he contends that the agreement is unenforceable because it is not supported by independent consideration. Under ordinary principles of contract law, if consideration in support of a contract is found to exist, inquiry into its adequacy is forbidden. *See Estrada v. Hanson*, 215 Minn. 353, 356, 10 N.W.2d 223, 225 (1943); *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 463 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). But contracts in restraint of trade, such as the noncompete agreement here, prompt a different view. *See Kallok v. Medtronic, Inc.*, 573 N.W.2d 356,

[1] Respondent's timeliness argument on the temporary injunction appeal is without merit because respondent did not provide appellant with a sufficient notice to initiate the appeal period. *In re Establishment of County Ditch No. 11*, 511 N.W.2d 54, 57 (Minn. App. 1994) (describing the requirements for a valid notice of filing), *review denied* (Minn. Mar. 31, 1994).

361 (Minn. 1998) (noting that noncompete agreements are "looked upon with disfavor, cautiously considered, and carefully scrutinized"). And if a noncompete agreement is made independent of the initial employment contract, it must be supported by independent consideration. *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983); *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982). The adequacy of that independent consideration "depend[s] on the facts of each case." *Cashman*, 323 N.W.2d at 741 (quoting *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130 (Minn. 1980)).[2] The consideration must be "bargained for and provide the employee with real advantages." *Davies*, 298 N.W.2d at 131.

Appellant's challenge to the consideration is without merit because the parties agree that respondent paid appellant $500 for his signing of the agreement. We note first that, on these facts, $500 is not an insignificant sum. *Cf. Jostens, Inc. v. Nat'l Computer Sys, Inc.*, 318 N.W.2d 691, 703 (Minn. 1982) (holding that a noncompete agreement that was not supported by real advantages, such as future benefits to the employee, was not supported by consideration). Moreover, as the district court found, "[i]f [appellant] felt [the $500] was insufficient, he could have negotiated for a larger amount. He chose not to do so." We conclude that the $500 that respondent paid appellant as a consideration to enter into the noncompete agreement was a consequence of a bargain that provided appellant a "real" advantage. *Davies*, 298 N.W.2d at 131. Finally, we note that

[2] Citing *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626-627 (Minn. 1983), respondent argues that once consideration is found, inquiry into its adequacy is forbidden. But in *Mettille*, the supreme court stated that ordinary principles of contract law do not strictly apply in the context of noncompete agreements. 333 N.W.2d at 630 n.5.

appellant's continued employment with respondent, while perhaps not sufficient alone, also indicates that the agreement was supported by adequate consideration. *See Freeman*, 334 N.W.2d at 630 ("The mere continuation of employment can be used to uphold coercive agreements . . . ."). Appellant's agreement was supported by adequate independent consideration.

Disputing that his employment with Mosborg risked irreparable harm to respondent, as found by the district court, appellant asserts that there is no evidence that respondent was harmed and that respondent and Mosborg were not competitors. He points in part to the permission he once had to serve on Mosborg's board.

The district court may issue a temporary injunction if "by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor." Minn. R. Civ. P. 65.02(b). In making the ruling, the court is to consider the relationship between the parties, relative hardship, likelihood of success, the public interest, and any administrative burdens. *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). The party requesting the injunction must show irreparable injury, *id.*, and for an injury to be irreparable there must be no adequate remedy at law. *See Morse v. City of Waterville*, 458 N.W.2d 728, 729-30 (Minn. App. 1990) (stating that, for a temporary injunction to issue, the injury "must be of such a nature that money alone could not suffice"), *review denied* (Minn. Sept. 28, 1990).

The district court determined that respondent would be irreparably harmed and had no adequate remedy at law because "[appellant] is a former employee of [respondent] and had access to proprietary information including its customer database. The harm to

[respondent] could be substantial if [respondent] loses its customers." The court also found that appellant had "access to [respondent's] trade secrets while in [his] position." The record supports these findings.

An affidavit of respondent's president states that appellant had access to confidential and proprietary information relating to, among other things, "[m]anagement of [respondent's] construction and development team"; "[c]urrent and potential customer needs and preferences"; "[respondent's] marketing strategies and marketing procedures"; "[n]egotiation strategies"; and a "[d]atabase of prospective retail clients, architects and construction managers." The record also contains the job descriptions of both positions, prompting the district court to determine that "[t]here is a direct and almost identical overlap between [appellant's] job duties at [respondent] and his job duties at Mosborg." *See Creative Commc'ns Consultants, Inc. v. Gaylord*, 403 N.W.2d 654, 657 (Minn. App. 1987) (finding irreparable harm based, in part, on former employee's threatened disclosure of confidential information). In addition, as respondent's Director of Construction, appellant had direct contact with respondent's customers and subcontractors. *See Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 452 (Minn. App. 2001) (inferring irreparable harm when the former employee came into contact with the employer's customers in a way in which he "obtains a personal hold on the good will of the business" (quotation omitted)).

These facts, together with the finding that appellant breached the agreement, are sufficient to support the district court's finding of irreparable harm. *See Cherne*, 278

N.W.2d at 92 (stating that irreparable harm can be inferred by the district court on a finding that a party breached an employment agreement).

There is no merit in appellant's specific claim that the district court clearly erred in its finding that Mosborg is "a business similar to or competing with" respondent. Appellant admitted that Mosborg was engaged in the business of "real estate construction and development management and leasing." He also admitted that respondent specializes in "building retail tenant spaces in shopping malls." Appellant was employed as the "Director of Construction" and was involved in retail construction and development projects. At Mosborg, appellant worked as the "Vice President of Development and Construction." The record supports the district court's determination that Mosborg was a business "similar to or competing with" respondent.

For these reasons, the district court did not abuse its discretion by granting the temporary injunction.

2. Motion to vacate

Appellant also contends that the district court improperly denied his motion to vacate the temporary injunction. The court's refusal to dissolve a temporary injunction will be reversed only when there is a clear abuse of discretion. *See In re Amitad, Inc.*, 397 N.W.2d 594, 596 (Minn. App. 1986).

The materials that accompanied appellant's motion support the court's conclusion that the proposal to vacate constituted an improper motion for reconsideration. *See* Minn. R. Gen. Pract. 115.11 (prohibiting motions for reconsideration without leave of the court). Although those materials included deposition testimony of respondent's

president, the testimony did not include any newly discovered information that would compel a different outcome. The remainder of appellant's motion re-argues the propriety of granting the temporary injunction. This record does not show an abuse of the district court's discretion in denying Mason's motion to vacate.

3. Judgment

Finally, appellant challenges the district court's summary judgment making the injunction permanent and awarding damages.

Permanent Injunction

Appellant's dispute on permanent injunctive relief is moot because the permanent injunction expired before this appeal was filed.[3] Although neither party has briefed the issue of mootness as it relates to the permanent injunction, we must address the issue. *See In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (stating that even if neither party raises the issue of mootness, an appellate court must consider it because it is "a constitutional prerequisite to the exercise of jurisdiction."). An issue is moot if, assuming this court resolved the issue in a party's favor, this court "is unable to grant effectual relief." *Id.*; *see also In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997) (stating that when an event occurs that makes a decision unnecessary, the issue is moot).

The district court's permanent injunction, in accordance with the terms of the agreement, was in effect only until late September 2006—12 months after appellant was

[3] The appeal of the temporary injunction, by contrast, is not moot because if successful, appellant could recover on respondent's bond. *See Hubbard Broad., Inc. v. Loescher*, 291 N.W.2d 216, 220 (Minn. 1980) (stating that the loss suffered by being out of employment due to an erroneously issued temporary restraining order is compensable by recovery on an injunction bond).

employed by Mosborg. Thus, the permanent injunction expired four months before appellant filed his notice of appeal. *See Hruska v. Chandler Assocs.*, 372 N.W.2d 709, 715 (Minn. 1985) (declining to address the merits of appellant's challenge to injunctive relief when the injunction had expired before the appeal). We cannot award relief on appellant's challenge to the permanent injunction.

We are not to dismiss an issue as moot if it is capable of repetition and likely to evade review. *Kahn v. Griffin*, 701 N.W.2d 815, 821-22 (Minn. 2005). Additionally, mootness may be overcome if the district court order relates to "important public issues of statewide significance that should be decided immediately." *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984). But no repetition is possible here because the agreement has expired and respondent is not seeking additional injunctive relief. And there is nothing in the record that shows that an issue of statewide significance exists.

Damages

Appellant argues next that the district court erred by awarding damages to respondent because the liquidated-damages provision in the agreement "bears no relation to any actual damage suffered by [respondent] and constitutes an unenforceable penalty clause." The agreement's liquidated-damages clause provides that appellant will pay $2,500 in damages for each calendar month in which he is not in compliance with the agreement, plus three times the amount paid to him as consideration (i.e., $500 x 3 = $1,500).

A contract's liquidated-damages clause is prima facie valid based on the assumption that it is not a penalty for nonperformance but that it represents fair

compensation for breach-related damages caused by a party's nonperformance. *Gorco Constr. Co. v. Stein*, 256 Minn. 476, 481, 99 N.W.2d 69, 74 (1959). In deciding whether a clause instead is an unacceptable penalty, the "controlling" factor is whether its amount is reasonable "in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." *Id.* at 482, 99 N.W.2d at 74. If "actual damages" cannot be determined under "ordinary rules," and if a liquidated damage provision is "not manifestly disproportionate" to actual damages, a liquidated-damages provision "will be sustained." *Id.* at 482-83, 99 N.W.2d at 75.

Undisputed evidence supports the district court's determination that the noncompete agreement contains a valid liquidated-damages provision. The agreement provided that "[i]t is recognized that damage in the event of breach of [appellant's] covenants under this Agreement will be difficult if not impossible to ascertain." The record does not suggest otherwise, and it contains no evidence permitting a finding that damages calculated under the agreement unfairly compensated respondent. The record does not conflict with the prima facie validity of the damages provision. *See id.* at 482, 99 N.W.2d at 74 (noting the prima facie validity of liquidated damages provisions).

Without proof of actual damages, the record permits the determination that the $14,000 award is not a penalty but represents fair compensation for damages caused by breach of the noncompete agreement.[4] *See id.* at 481-83, 99 N.W.2d at 74-55; *Dean Van*

[4] Appellant claims that the district court erred by awarding respondent five months of liquidated damages because appellant worked for Mosborg for only four months. Although appellant worked for Mosborg for a period of four months, the liquidated-damages provision entitles appellant to liquidated damages for "each calendar month" in

Horn Consulting Assocs. v. Wold, 367 N.W.2d 556, 560 (Minn. App. 1985) (enforcing a liquidated-damages clause of a noncompetition agreement even though damages were not actually proven), *review denied* (Minn. July 17, 1985). Also, the deposition testimony and affidavit from respondent's president supports the district court's finding that respondent would suffer damages as a result of appellant's breach.

In sum, the record supports the district court's finding that the liquidated-damages clause is enforceable.

Attorney Fees

Based on his denial of a breach of the agreement, appellant asserts that the district court erred by awarding respondent attorney fees, as provided by the agreement. He acknowledges that "[t]he [a]greement provides for an award of attorneys fees to enforce the [a]greement." *See Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004) (stating that an award of attorney fees is appropriate when authorized by statute or by contract). Because we affirm the district court's determination that appellant violated the contract, there is no error in its award of fees as provided by the agreement.

Affirmed.

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which the employee is not in compliance. Because Mosborg employed appellant from September until January (five calendar months), the district court did not err.