NO. COA11-954
NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2012

KIGHT'S MEDICAL CORP.,
Plaintiff/Counterclaim
Defendant,

v.

Wake County
No. 08 CVS 12075

GINGER KIGHT PICKETT,
Defendant/Counterclaim
Plaintiff,

and

KIGHT'S MEDICAL OF VIRGINIA, INC.
d/b/a ATLANTIC HOME MEDICAL,
Defendant/Third Party
Complaint Plaintiff,

v.

JOHN A. KIGHT,
Third Party Complaint
Defendant

Appeal by defendant from order entered 8 February 2011 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 8 February 2012.

Kevin W. Benedict of Williams Mullen, PC, attorney for defendant Ginger Kight Pickett.

K. Edward Greene, Tobias Hampson, Paul Puryear, and Michael Dean DeFrank, of Wyrick Robbins Yates & Ponton LLP, attorneys for plaintiff Kight's Medical Corp., et al.

ELMORE, Judge.

Ginger Kight Pickett (defendant) appeals from an order denying her motion for judgment notwithstanding the verdict stemming from a damage award in favor of Kight's Medical Corp. (plaintiff). After careful consideration, we affirm.

In January 1994, John A. Kight formed Kight's Medical Corporation (KMC), a company that engaged in the business of supplying durable medical equipment. In late 2005, defendant, Kight's sister, expressed interest in owning a KMC franchise in Chesapeake, Virginia. Kight agreed to open a KMC branch in that area. In January 2006, Kight hired defendant as the branch manager, with the intent that she would later purchase the branch as a franchise.

As a condition of her employment, defendant signed a non-compete agreement and a confidentiality agreement. The non-compete agreement stated that defendant would "not compete in any way including but not limited to working for a competitor within 75 miles of any office of Kight's Medical Corp., including it's (sic) satellite offices, either during employment

or for a period of 2 years after separation." .The confidentiality agreement stated that defendant would not "hav[e] contact with Kight's Medical Corp's or affiliated company's patients or customers for the purpose of soliciting their business away from Kight's Medical or an affiliate company."

In February 2006, defendant and Kight executed a confidential letter of intent regarding their plan for the Chesapeake branch to ultimately become a franchise owned by defendant. That letter stated that "in due course [defendant] will purchase the CHESAPEAKE Branch from Kight's Medical Corp.[.]" Also, "[t]his letter is intended to set forth our understanding of the principal terms and conditions under which [defendant] . . . will acquire the business and assets of the Chesapeake Branch[.]" In the letter the parties agreed that "[w]ithin [six] months after the CHESAPEAKE Branch opens and commences operations, or such other time as [the parties] agree, [defendant] will purchase from the Corporation all of the assets and business of the CHESAPEAKE Branch[.]"

However, the branch was not purchased by defendant within six months. Instead, defendant continued to work for KMC as a branch manager for several years. During that time, defendant

and Kight had numerous disagreements regarding how the branch was being operated. As a result, the relationship between the parties began to deteriorate. Despite these troubles, defendant and Kight continued to work towards turning the branch into a franchise. In 2007, defendant created a corporation named "Kight's Medical of Virginia, Inc." (KMV), with the purpose of it serving as the name of her eventual franchise. At that time, the KMC branch in Chesapeake began operating under the name KMV, but it remained a branch of KMC and not a franchise. Subsequently, further disagreements arose between defendant and Kight regarding billing and payment. As a result, Kight terminated defendant's employment on 3 June 2008.

At that time, Kight intended to continue operating the branch without defendant. However, defendant informed Kight that she intended to operate her own durable medical supply business from the existing office. She agreed to transfer all of KMC's equipment to the branch in Raleigh and to put all of KMC's inventory in a warehouse near the Chesapeake branch. As a result, Kight had to relocate the Chesapeake branch to a new office in the area.

Meanwhile, defendant continued to supply durable medical equipment under the KMV name. After some time, she began

conducting business under the name "Atlantic Home Medical." On 28 August 2008, defendant sent letters to healthcare providers who had contracts with KMC informing them of this change. She wrote, "I have been privileged to serve the continuous care needs of your patients since 2006. . . . Recently, certain changes have occurred in my business that may have created some confusion in the healthcare community. . . . I ceased any further affiliation or business relationship with Kight's Medical Corp. . . . I began doing business under the name 'Atlantic Home Medical.' . . . I look forward to a continuing relationship with you and thank you in advance for your continuing loyalty to my business."

On 11 July 2008, KMC filed suit against defendant for 1) breach of the non-compete agreement, 2) breach of the confidentiality agreement, 3) constructive fraud, 4) interference with business relations, 5) unfair and deceptive trade practices, 6) conversion, 7) unjust enrichment, 8) misappropriation of funds, and 9) punitive damages. On 4 May 2010, a jury rendered a verdict in favor of KMC. On 13 June 2010, defendant filed a motion for judgment notwithstanding the verdict (JNOV). On 9 June 2010 the trial court entered a final judgment against defendant. In that judgment the trial court,

among other things, awarded plaintiff $1,066,244.00 based on the conversion claim and trebled the jury's unfair and deceptive trade practices award, resulting in a total award of $3,984,000.00 relating to that claim. On 8 February 2011, the trial court entered an order denying defendant's motion for JNOV. Defendant now appeals.

"On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000) (citation omitted).

Arguments

I. Conversion award

Defendant first argues that plaintiff 1) failed to identify the specific property that was converted and 2) failed to produce evidence at trial of its value. Thus, defendant argues that the conversion award is unsupported by the evidence and should be set aside as a matter of law. We disagree.

"The measure of damages for conversion is the fair market value of the chattel at the time and place of conversion, plus interest. A plaintiff must present evidence that will furnish a basis for determination of damages; however, it is not

necessary to prove damages with absolute certainty." *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 94, 394 S.E.2d 824, 831 (1990) (citations omitted). In determining the value of converted property, "the opinion of a property owner is competent evidence as to the value of such property." *Compton v. Kirby*, 157 N.C. App. 1, 18, 577 S.E.2d 905, 916 (2003). Furthermore, "[e]vidence of the price paid for property . . . is probative of value[.]" *Esteel Co. v. Goodman*, 82 N.C. App. 692, 699, 348 S.E.2d 153, 158 (1986).

Here, plaintiff argues that defendant converted the KMC Chesapeake branch in its entirety. At trial, plaintiff offered a spreadsheet (exhibit 43) that illustrated the expenses it incurred in establishing the Chesapeake branch from 2006 through the time it was converted by defendant in June 2008. Kight testified that exhibit 43 showed "the total expenses that Kight's Medical has spent on . . . developing [the Chesapeake] branch" and that exhibit 43 included money spent on "all of the equipment and supplies that were purchased for that particular branch[.]" We conclude that this evidence was sufficient to furnish a basis for the jury to determine the fair market value of the Chesapeake branch.

II. Award for wrongful competition

Defendant next argues 1) that the proper measure of damages in unfair trade practice claims alleging wrongful competition is lost profits and 2) that plaintiff failed to present any evidence at trial that it suffered lost profits. As such, defendant argues that the jury's award for wrongful competition is unsupported by evidence. We disagree.

"[U]nfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions." *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 61, 620 S.E.2d 222, 231 (2005). "The measure of damages used [for wrongful competition] should further the purpose of awarding damages, which is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money." *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 233, 314 S.E.2d 582, 585 (1984)(quotations and citations omitted).

Here, Kight testified that plaintiff sustained significant losses associated with "having to start the Chesapeake branch back up[.]" Some of these losses were again illustrated by exhibit 43. Kight explained that exhibit 43 showed "what it cost Kight's Medical to rebuild that branch" after it was

converted by defendant in June 2008. In addition, he testified that "[w]e [also] had to go out and build new referral sources for the business" which was "part of the cost . . . [we] had to incur due to [defendant's] actions[.]" Plaintiff also admitted into evidence its profit/loss statements (exhibit 49). Referencing exhibit 49, Kight testified that the Chesapeake branch turned a profit of approximately 1) $35,000.00 in January 2008, 2) $24,500 in February 2008, 3) $8,800 in April 2008, and 4) $21,599.00 in May 2008, but after June 2008 "[t]he trends were all losses[.]" We conclude that the sum of this evidence provided the jury with a sufficient basis to determine the damages plaintiff suffered as a result of defendant's wrongful competition.

Defendant further argues that the jury's verdicts represent "disparate compensatory damages findings" that cannot be reconciled. Specifically, defendant argues that the jury's verdicts are inconsistent because the jury awarded plaintiff $1 for wrongful competition under issue 1 of the verdict sheet, but they awarded plaintiff $1,328,000.00 for wrongful competition under issue 12 of the verdict sheet. As such, defendant asks this Court to issue a writ of certiorari to review the question

of whether the jury's verdicts present a fatal inconsistency. We decline.

"Rule 21 of our appellate rules provides that a ***writ of certiorari*** may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals[.]" ***Rauch v. Urgent Care Pharm., Inc.***, 178 N.C. App. 510, 515, 632 S.E.2d 211, 216 (2006) (quotations and citations omitted). However, "[o]ur rules specify that a petition for ***writ of certiorari*** to this Court must be filed with the clerk of the Court of Appeals, and the petition must contain the following: [1] a statement of the facts necessary to an understanding of the issues presented by the application; [2] a statement of the reasons why the writ should issue; and [3] certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition." ***Id.***

Here, defendant did not file a petition for writ of certiorari with the clerk of this Court. Instead, she made the request in her brief. This Court has declined to grant requests for the issuance of a writ of certiorari in a brief that fails to comply with the requirements of Rule 21. ***See Id.*** (Holding that "Plaintiff's sole statement in her brief fails to comply

with the requirements of Rule 21"). Thus, we decline to issue a writ of certiorari, and we will not review defendant's argument with regards to this issue.

III. Binding agreement

Lastly, defendant argues that after the parties signed the "letter of intent," their subsequent communications established a binding agreement and that plaintiff breached the agreement first. We disagree.

"There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds -- the coming together of two minds on a thing done or to be done. A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." ***Williams v. Jones***, 322 N.C. 42, 49, 366 S.E.2d 433, 438 (1988) (quotations and citations omitted).

Here, it is clear from the record that the parties agreed on very little, if anything, concerning the eventual purchase of the branch as a franchise by defendant. In defendant's own statement of the facts she indicates that the parties were never

able to agree on 1) the date to complete their deal, 2) a definite purchase price, 3) the amount of the down payment, or 4) the amount of the franchise fee. Thus, it is obvious that the parties most certainly never reached an "agreement of two minds." Therefore, we conclude that no binding agreement ever existed between the parties.

Affirmed.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).