COURT OF APPEALS DECISION DATED AND FILED

October 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 03-0455

Cir. Ct. No. 02CV000745

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT II**

PHILIP M. MYDLACH AND STARTING POINT TECHNOLOGIES, INC.,

PLAINTIFFS-APPELLANTS,

V.

WAYNE CURT KISER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Philip M. Mydlach and Starting Point Technologies, Inc. appeal from a judgment in favor of Wayne Curt Kiser, a former employee of Starting Point. They argue that a settlement agreement did not release Kiser from claims against him as a Starting Point employee, that summary

judgment dismissing claims against Kiser was inappropriate, and that entry of judgment based on a stipulation to which they were not a party was error. We conclude that the settlement agreement releases Kiser and affirm that portion of the judgment dismissing Mydlach's claims. We reverse that portion of the judgment dismissing Starting Point's claim for disgorgement. We also reverse the money judgment in favor of Kiser and remand the cause for further proceedings.

¶2 Starting Point, a corporation solely owned by Mydlach, entered into a contract with Jacquelynn's China Matching Service, Inc. (JCMS), whereby Starting Point would create a customized computer software program to track JCMS's orders and inventory. Kiser was an employee of Starting Point and assigned to complete the software.

¶3 Mydlach sold Starting Point assets and liabilities to Computer Consultants of America-Wisconsin, Inc. (CCI). Like most of Starting Point's employees, Kiser became an employee of CCI. Excluded from the sale was Starting Point's contract with JCMS.

¶4 To fulfill its obligation to JCMS, Starting Point asked Kiser to continue as a part-time employee of Starting Point and complete the project. Kiser billed Starting Point for hours worked on the JCMS software between March 1 and October 19, 1999, and was paid accordingly.

¶5 Ultimately the software was delivered to JCMS, but JCMS found it incomplete and slow. On March 21, 2001, JCMS commenced an action against Mydlach and CCI (as the successor corporation to Starting Point) for breach of contract. The suit was settled with Mydlach and CCI agreeing to pay damages. A settlement agreement (hereafter referred to as the JCMS/Mydlach settlement agreement) was executed in which JCMS released Mydlach, Starting Point, CCI

and all of their “affiliates, representatives, agents, employees, officers, directors, shareholders, insurers, successors and assigns” from any and all claims arising out of conduct occurring prior to the effective date of the agreement. JCMS agreed to indemnify all released persons for claims asserted against them relating to JCMS. The agreement also provided that Mydlach and CCI released each other and their “affiliates, representatives, agents, employees, officers, directors, shareholders, insurers, successors and assigns” from all claims related to JCMS.

¶6 Mydlach and Starting Point then brought this action against Kiser for alleged misrepresentation, breach of contract and negligence in the design of the software provided to JCMS. They seek compensatory and punitive damages, reimbursement of the settlement paid to JCMS and attorney’s fees incurred in defending JCMS’s lawsuit, and disgorgement of wages paid to Kiser by Starting Point after March 1, 1999.[1] Kiser asserted a counterclaim alleging that because the action related to services provided as a Starting Point employee he was entitled to indemnification and contribution from Starting Point for costs incurred in defending the action and any judgment against him. Kiser also alleged a counterclaim against Mydlach for breach of the JCMS/Mydlach settlement agreement.[2] Kiser moved for and was granted judgment on the pleadings dismissing Mydlach’s claims on the determination that they were subject to the

[1] CCI’s purchase of Starting Point was completed on March 1, 1999. Starting Point continued thereafter to wind down its affairs.

[2] Kiser made a demand on JCMS for indemnification under the terms of the JCMS/Mydlach settlement agreement. JCMS acknowledged the obligation to indemnify Kiser and stipulated that its liability to Kiser was $60,000. JCMS assigned to Kiser any rights it may have against Mydlach for breach of the settlement agreement. Kiser’s sole recourse for collection of JCMS’s stipulated liability is the assigned claim against Mydlach for breach of the settlement agreement.

release in the JCMS/Mydlach settlement agreement. Kiser then moved for and was granted summary judgment dismissing Starting Point's claims against him and granting his counterclaims against Mydlach and Starting Point. A money judgment for $60,000 was entered against Mydlach.

¶7 We first address the circuit court's determination that Mydlach's claims against Kiser are barred by the JCMS/Mydlach settlement agreement. The circuit court's decision on a motion for judgment on the pleadings is reviewed under the same methodology applied to summary judgment. ***Schuster v. Altenberg***, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988). Essentially a question of law is presented which we review independently, without deference to the decision of the trial court. ***County of Dane v. Norman***, 174 Wis. 2d 683, 686, 497 N.W.2d 714 (1993). However, we value the circuit court's decision. ***Pertzsch v. Upper Oconomowoc Lake Ass'n***, 2001 WI App 232, ¶7, 248 Wis. 2d 219, 635 N.W.2d 829.

¶8 The settlement agreement states that Mydlach releases CCI and its employees from liability. Mydlach argues that the settlement agreement was only intended to release CCI employees who, in their capacity as CCI employees, performed any service related to the JCMS project. He contends that because Kiser never worked on the JCMS project as a CCI employee but as a still part-time employee of Starting Point, Kiser is not released. He contends the settlement agreement must be construed to give effect to the parties' actual intent. ***Brandner v. Allstate Ins. Co.***, 181 Wis. 2d 1058, 1078, 512 N.W.2d 753 (1994).

¶9 Unambiguous language in a release, like in any contract, must be enforced as it is written regardless of the parties' intentions. ***Kernz v. J. L. French Corp.***, 2003 WI App 140, ¶9, 667 N.W.2d 751. "When the terms of a

contract are plain and unambiguous, we will construe the contract as it stands." ***Id.*** (quoting ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345). The rules of contract construction cannot interject ambiguity into unambiguous terms even when necessary to relieve a party from disadvantageous terms. ***State v. Windom***, 169 Wis. 2d 341, 349, 485 N.W.2d 832 (Ct. App. 1992).

¶10 The expansive listing of persons released by the settlement agreement is not ambiguous. Although we recognize that Kiser may not have worked on the JCMS project as an employee of CCI,[3] he was nonetheless a CCI employee when the settlement agreement was executed, a fact known to all parties to the settlement agreement. Therefore, the settlement agreement covers Kiser. If Mydlach wanted to exclude Kiser from the generic class of CCI employees released under the settlement agreement, the language should have specifically done so. It may be a harsh result but one that the law demands in giving effect to unambiguous language in the settlement agreement. Judgment on the pleadings was appropriate and we affirm the circuit court's determination that Mydlach's claims against Kiser are barred.

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[3] Kiser contends that Mydlach admitted in his answers to the counterclaim that the claims against Kiser arise out of services Kiser provided as an employee of Starting Point and CCI. Mydlach argues that the admission is misconstrued because he had no knowledge of whether Kiser performed services for JCMS as a CCI employee. We need not resolve whether Kiser, as a CCI employee, performed any services for JCMS. The inquiry is irrelevant under the broad terms of the settlement agreement.

¶11 Starting Point was not a party to the lawsuit brought by JCMS and was not named in the mutual release between Mydlach and CCI.[4] Therefore, granting judgment on the pleadings as to Mydlach did not resolve Starting Point's claims. Kiser moved for summary judgment dismissing Starting Point's claims, including the claim for disgorgement of wages. He argued that all corporate assets had been distributed to Mydlach and therefore only Mydlach had suffered damages as a result of JCMS's lawsuit. He also argued that disgorgement was not an available remedy unless an employee breaches a duty of loyalty by engaging in competitive activity.

¶12 We agree, as Mydlach contends, that the circuit court failed to set forth its reasoning in granting Kiser's motion for summary judgment. We do not agree, however, that the circuit court appeared confused about the scope of its ruling. In any event, our review of summary judgment is de novo; we apply the standards set forth in WIS. STAT. § 802.08(2) (2001-02),[5] in the same manner as the circuit court. ***Norman***, 174 Wis. 2d at 686.

¶13 The pleadings admit that Starting Point was dissolved on May 17, 1999, and that some or all of the assets of Starting Point were distributed to Mydlach. Mydlach's answers to interrogatories state that the assets of Starting Point were distributed to him. He further acknowledged that JCMS's lawsuit

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[4] The mutual release provides: "Mydlach, on the one hand, and CCI and CCAW, on the other hand, hereby mutually, fully and forever release each other, their affiliates, representatives, agents, employees, officers, directors, shareholders, insurers, successors and assigns." By necessity the expansive listing of affiliates, representatives, etc., refers only to such persons or entities related to CCI and CCAW. As a signatory to the agreement, Mydlach is an individual with no affiliates, representatives, etc.

[5] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

against him was permissible under WIS. STAT. § 180.1408(2), permitting enforcement of a claim against a dissolved corporation against the shareholder to whom the assets have been distributed. The JCMS/Mydlach settlement agreement reflects that it was Mydlach who incurred the costs of the action and settlement. Further, because of the settlement agreement and JCMS's release, there is no possibility that Starting Point will be liable for any damages. Kiser established a prima facie case that Starting Point did not incur any actual damages occasioned by the failed software (JCMS's claims).

¶14 Starting Point argues that as a dissolved corporation it can pursue claims to collect assets. *See* WIS. STAT. § 180.1405(1)(a). While that is true, it can only recover for damages incurred. Starting Point offered no affidavit in opposition to Kiser's motion for summary judgment. Therefore, it failed to raise any factual issue that it had in fact incurred or paid any damages to JCMS or that it had incurred any attorney fees as a result of JCMS's lawsuit. When the party opposing summary judgment fails to respond or raise an issue of material fact by affidavit, summary judgment can be rendered on that basis alone. ***Bank of Two Rivers v. Zimmer***, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983).

¶15 Starting Point contends that Mydlach paid the settlement and lawsuit costs out of assets he held as "trustee" for the dissolved corporation. No provision is made in WIS. STAT. § 180.1408(2), or any of the statutory provisions governing corporate dissolution, that the shareholder holds distributed assets in trust for the dissolved corporation. There is no corresponding right of the shareholder to pursue claims on behalf of the corporation. Additionally, it does not appear of record that at any point in the JCMS litigation that Mydlach asserted that his liability was only as a trustee of Starting Point. Although the JCMS/Mydlach settlement agreement recites the evolution of Starting Point's corporate form,

name and dissolution,[6] nothing suggests that Starting Point was funding the settlement. The right to recoup from Kiser the cost of the JCMS lawsuit and settlement was Mydlach's alone and individually. In short Mydlach cannot, as a matter of convenience, now claim he was paying on behalf of the corporation for the purpose of making an end run around the settlement agreement.

¶16 Starting Point did not incur any liability with respect to the JCMS litigation and consequently has no claim for compensatory damages against Kiser based on those litigation expenses. That said, the only possible recovery by Starting Point is of wages to Kiser for work that may have been useless and of no value. Starting Point argues that Kiser breached a duty of loyalty by misrepresenting his progress and hours spent on the JCMS project. "An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned." ***Hartford Elevator, Inc. v. Lauer***, 94 Wis. 2d 571, 583, 289 N.W.2d 280 (1980) (quoting RESTATEMENT (SECOND) OF AGENCY § 469 (1957)).

¶17 The first step in summary judgment methodology is to examine the complaint to determine whether it states a claim for relief, "because it is only if the

[6] The settlement agreement recited that Starting Point's assets and liabilities were transferred on August 1, 1996, to Starting Point Consulting Services, LLC, and that on August 28, 1997, Starting Point changed its name to Starting Point Consulting, Inc., and on March 27, 1999, the name changed to Southwind Consulting. The assets and liabilities of Starting Point Consulting Services, LLC, is what CCI ultimately acquired. Thereafter, Starting Point Consulting Services, LLC, changed its name to Southwind, LLC. The recitals also reflect that Mydlach was the sole shareholder and managing member of all the Starting Point variations and that all those businesses dissolved on May 17, 1999.

complaint does so that we move on to examine the parties' factual submissions. In deciding whether a complaint states a claim for relief, we take as true all facts pleaded and all reasonable inferences favoring the plaintiff that may be derived from these facts." ***Murray v. City of Milwaukee***, 2002 WI App 62, ¶7, 252 Wis. 2d 613, 642 N.W.2d 541. At the outset, we agree with Kiser's appellate argument that allegations that he was negligent or incompetent in his performance would not allow recovery for a breach of loyalty because of the requirement that the conduct be willful and deliberate. However, Starting Point also alleges misrepresentation and breach of contract. The complaint alleges that Starting Point paid Kiser for more than 100 hours of work between March 1, 1999, and October 19, 1999. In March 1999, Kiser told Starting Point that the project was almost complete and that it would be done with a few more hours of work. In April, May and August 1999, Kiser told Starting Point that the project would be done by "the end of next week," "end of the month," and "beginning of next week." The project was not delivered to JCMS until after September 22, 1999. An inference arises that none of Kiser's representations were truthful, and if they were truthful, it would not have taken more than 100 hours to complete the project. The complaint also alleges that Starting Point had an agreement with Kiser to complete the JCMS software and yet it was delivered incomplete. If Starting Point is able to prove these allegations, the resulting misrepresentation or breach of contract may satisfy the willful and deliberate requirement for a claim of disobedience or breach of loyalty.

¶18 Kiser's answer denies the allegations that he represented that the project was almost complete or that he failed to complete it. Thus, we turn to consider whether Kiser presented a prima facie case for summary judgment dismissing the claim for disgorgement. *See* ***Goldstein v. Lindner***, 2002 WI App

122, ¶10, 254 Wis. 2d 673, 648 N.W.2d 892, *review denied*, 2002 WI 121, 257 Wis. 2d 119, 653 N.W.2d 890 (Wis. Sept. 3, 2002) (No. 01-2068) ("If the pleadings set forth a claim for relief and a material issue of fact, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented."). The only evidentiary material submitted by Kiser was Mydlach and Starting Point's answers to interrogatories. The interrogatories asked the basis for the allegations in the complaint and the answers repeated that representations were made about the time needed to complete the project and that the project was not completed. Nothing dispels the permissible inference that in a breach of the duty of loyalty owed to Starting Point, Kiser misrepresented how the project was progressing and hours worked on the project. Kiser has not made a prima facie case for summary judgment. We conclude that dismissal of Starting Point's claim for disgorgement of wages was improper. Issues of fact exist about Kiser's conduct and the difference, if any, in the compensation paid and the value of his service.[7]

¶19 We turn to the final issue which results in reversal of the $60,000 judgment in favor of Kiser based on Mydlach's breach of the JCMS/Mydlach settlement agreement. The amount of the judgment is based on the stipulation between Kiser and JCMS that JCMS's liability to Kiser for indemnification is

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[7] We do not resolve whether disgorgement, a remedy to prevent unjust enrichment to a wayward employee or restitutional in nature, constitutes an award of actual or compensatory damages so as to support Starting Point's claim for punitive damages. *See* ***Tucker v. Marcus***, 142 Wis. 2d 425, 438, 418 N.W.2d 818 (1988) (punitive damages cannot be awarded in the absence of an award of actual damages); ***Burg v. Miniature Precision Components, Inc.***, 111 Wis. 2d 1, 9, 330 N.W.2d 192 (1983) ("to recover wages paid, the employer must prove that the disloyalty so affected the employee's on-the-job performance that it would constitute unjust enrichment to allow the employee to retain the compensation"); ***Pederson v. Johnson***, 169 Wis. 320, 326, 172 N.W. 723 (1919) (disgorgement of profits does not require the employer to show any actual loss).

$60,000, and the assignment of JCMS's right to proceed against Mydlach. Mydlach argues that the $60,000 sum has no relationship to Kiser's damages as a result of the breach of the settlement agreement. We agree.

¶20 The JCMS/Mydlach settlement agreement included a mutual release between Mydlach and CCI, and its employees, thus Kiser. Mydlach's suit against Kiser breached that provision. There was no breach of any provision concerning JCMS. Although JCMS agreed to indemnify Mydlach and all other released parties (thus Kiser), there was no reciprocal agreement from Mydlach to indemnify JCMS for damages it might suffer. JCMS had no right of action against Mydlach for reimbursement for any indemnification it might make under the agreement. The stipulation of damages and assignment between JCMS and Kiser has no bearing in this action because Kiser merely stands in JCMS's empty shoes. The stipulation is only the measure of JCMS's liability to Kiser but does not address Mydlach's liability to Kiser.

¶21 We do not find Kiser's reliance on ***Deminsky v. Arlington Plastics Machinery***, 2003 WI 15, 259 Wis. 2d 587, 657 N.W.2d 411, persuasive. In addressing whether an indemnitor was bound by a settlement between the indemnitee and the plaintiff, the ***Deminsky*** court recognized that it is good public policy to encourage amicable settlements by avoiding a rule that requires an indemnitee to litigate liability just to preserve a cause of action against a prospective indemnitor. ***Id.***, ¶39. The court held that because a tender of defense was rejected, the indemnitor was not entitled to a full trial on the indemnitee's liability and damages. ***Id.***, ¶47. However, because no notice was given of the settlement, the indemnitor was entitled to a limited hearing on the reasonableness of the settlement agreement between the indemnitee and the plaintiff. ***Id.*** "Under circumstances such as these, the indemnitor is entitled to produce evidence that the

settlement was unreasonable, including evidence that the indemnitee faced no potential liability or that the settling parties were involved in fraud or collusion." ***Id.*** Kiser argues that Mydlach has not raised any issue of fact regarding the reasonableness of the settlement and therefore is not entitled to any hearing. ***Deminsky*** simply has no application here because Mydlach is not an indemnitor of JCMS's liability to Kiser or the settlement reached between JCMS and Kiser.

¶22 Mydlach only has potential liability directly to Kiser for a breach of the release in the JCMS/Mydlach settlement agreement. A trial is needed on liability and the amount of damages, if any, Kiser has suffered as a result of Mydlach's breach. We remand for this purpose and for further proceedings on Starting Point's claim for disgorgement of Kiser's wages.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.