COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2073 **Cir. Ct. No. 2010CV952**

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

KEY RAILROAD DEVELOPMENT, LLC,

PLAINTIFF-APPELLANT,

V.

BENEDETTO GUIDO, VIA RAIL LOGISTICS AND FRANK HEAFY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY and MARC A. HAMMER, Judges. *Reversed and cause remanded*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Key Railroad Development, LLC, appeals a summary judgment dismissing its claims against Benedetto Guido and Via Rail

Logistics (collectively, Guido), and Frank Heafy.[1] Key Railroad alleged, inter alia, that Guido and Heafy breached employee restrictive covenants. It argues the circuit court erroneously determined Key Railroad failed to produce sufficient evidence to support its claims. We agree and conclude there are material factual disputes precluding summary judgment. Further, we reject Guido's and Heafy's alternative arguments that the restrictive covenants were unenforceable. We therefore reverse and remand.

BACKGROUND

¶2 Guido and two co-workers left their railroad industry engineering jobs to take positions as the head employees of a newly organized engineering consulting company, Key Railroad. At his former position, Guido was the primary contact for Union Pacific Railroad and Canadian Pacific Railway. The three employees brought their industry expertise and contacts, and Kenneth Wein provided the funding. Wein was the sole owner, and Guido and the others signed employment agreements with restrictive covenants in March 2001. At Guido's insistence, Wein then hired the remaining employees from the rail division at Guido's former employer.

¶3 Guido directed Key Railroad's business operations and also maintained his contacts with Union Pacific, Canadian Pacific, and others. In April 2002, Guido fired one of the other two head employees. Guido was then responsible for nearly all marketing and business development. Guido resigned in

[1] The Honorable Kendall M. Kelley issued a written summary judgment decision. Based on that decision, Judge Kelley issued a judgment dismissing Key Railroad's claims against Heafy. Due to judicial rotation, the Honorable Marc A. Hammer issued an order dismissing Key Railroad's claims against Guido and Via Rail, also based on the summary judgment decision.

December 2005. Wein rejected an offer to purchase by Guido. Shortly after leaving Key Railroad, Guido started a new company, Via Rail, which provided consulting services to the railroad industry.

¶4 Heafy worked at Key Railroad as a designer and surveyor. After Guido left, Heafy was promoted to the marketing and business development position. In exchange for his promotion, increased salary, and profit sharing, Heafy was required to execute the same employment agreement with restrictive covenants that the original three head employees had signed. Heafy worked in his new position from November 2006 until he resigned in April 2007. Heafy had accepted an employment offer from Guido at Via Rail three weeks prior to resigning.

¶5 Guido's and Heafy's employment agreements with Key Railroad stated: "Employment. [Key Railroad] hereby employs [Guido and Heafy] and [they] hereby accept[] employment ... on an 'at-will' basis, subject to terms and conditions of this Agreement ...." The agreement included a section prohibiting the disclosure of confidential information and trade secrets during or after employment,[2] as well as a nonsolicitation section, which provided:

> Nonsolicitation. The parties hereto acknowledge and agree that [Key Railroad's] client contacts and relations are established and maintained at great expense and [that,] by virtue of [Guido's or Heafy's] employment with [Key Railroad], [they] will have unique and extensive exposure to and personal contact with [Key Railroad's] clients, and that [they] will be able to establish a unique relationship with those individuals and entities that will enable [them], both during and after employment, to unfairly compete

[2] Key Railroad does not develop any argument that Guido or Heafy violated the confidential information or trade secrets provisions of the employment agreement.

> with [Key Railroad]. Accordingly, [Guido or Heafy] shall not, at any time during employment and for a period of one year after termination of employment, directly or indirectly, whether as an agent, investor, employer, employee, consultant, representative, trustee, partner, proprietor or otherwise do any of the following:
>
> (a) solicit or accept from any person or entity who is a client of [Key Railroad] and with whom [Guido or Heafy] has contact during [their] employment (any such person or entity is hereinafter referred to individually as a "Client" and collectively as the "Clients") any business to the extent that solicitation or acceptance of such business would constitute competing with the Business;
>
> (b) request or advise any of the Clients, or any suppliers or other business contacts of [Key Railroad] who have business relationships with [Key Railroad] and with whom [Guido or Heafy] had contact during [their] employment, to withdraw, curtail or cancel any business relations with [Key Railroad];
>
> (c) except with the prior written consent of [Key Railroad], induce or attempt to induce any sales representative, consultant, employee or agent of [Key Railroad] to terminate his/her employment relationship or other contractual relationship, whether oral or written, with [Key Railroad].[3]

¶6 The circuit court determined that the restrictive covenants found in the employment agreement were enforceable. However, it concluded Key Railroad failed to present sufficient evidence to create any material issues of disputed fact concerning whether Guido or Heafy violated any terms of the

[3] Key Railroad recites evidence that Guido induced Heafy to leave Key Railroad, arguably in violation of the prohibition in paragraph c. Key Railroad, however, has developed no such argument. Guido asserts Key Railroad therefore abandoned the argument. Key Railroad does not address the issue in its reply brief. We therefore deem the argument abandoned and do not address it further. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (issue raised but not briefed or argued is deemed to be abandoned).

employment agreement.[4] The court therefore granted summary judgment to Guido and Heafy and dismissed Key Railroad's claims. Key Railroad now appeals.

DISCUSSION

¶7 Summary judgment is appropriate if there are no material issues of disputed fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).[5] It is the moving party's burden to establish the absence of a factual dispute and entitlement to judgment as a matter of law. ***Grosskopf Oil, Inc. v. Winter***, 156 Wis. 2d 575, 581, 457 N.W.2d 514 (Ct. App. 1990). Any doubts as to the existence of a genuine issue of material fact should be resolved against the moving party. ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). If the material presented is subject to conflicting interpretations or reasonable people might differ as to the significance, it is improper to grant summary judgment. ***Id.*** at 339.

Whether the restrictive covenants are enforceable

¶8 The parties dispute whether the employment agreement's restrictive covenants are enforceable, and also disagree on the appropriate standard under which their enforceability is to be examined. Key Railroad argues we should apply the common law "rule of reason" applicable to the sale of a business, and

[4] The circuit court also granted a motion to exclude those portions of Key Railroad's supporting affidavits that were not based on personal knowledge. Problematically, however, the court did not identify what portions of which affidavits, specifically, it was excluding.

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

conclude the covenants are enforceable. Guido and Heafy contend we should apply WIS. STAT. § 103.465, which applies to restrictive covenants in employment contracts, and conclude the covenants are unenforceable. Ultimately, we agree with the circuit court—the statute applies, but the covenants are nonetheless enforceable.

¶9 Key Railroad argues the rule of reason should apply because the primary employees who signed the employment agreement shared equal bargaining power with the owner, similar to the situation of a business sale. Key Railroad contends this case is similar to ***Selmer Co. v. Rinn***, 2010 WI App 106, 328 Wis. 2d 263, 789 N.W. 2d 621, where we held that a restrictive covenant in an executive's stock option agreement was subject to the less restrictive rule of reason because the executive had a choice whether to accept or reject the covenants and purchased an ownership interest in the company. ***Selmer***, in turn, relied on ***Reiman Associates, Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 N.W.2d 292 (Ct. App. 1981), which involved restrictive covenants incident to a business sale.

¶10 ***Reiman*** and ***Selmer*** are both distinguishable. The employees here obtained no ownership share in Key Railroad, and they had no choice to reject the covenants if they wished to obtain their employment positions. There is no question that WIS. STAT. § 103.465 applies to the restrictive covenants in Guido's and Heafy's employment contracts.

¶11 WISCONSIN STAT. § 103.465, titled, "Restrictive covenants in employment contracts[,]" provides:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that

> employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

¶12 "Restrictive covenants in Wisconsin are prima facie suspect as restraints of trade that are disfavored at law, and must withstand close scrutiny as to their reasonableness." ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶19, 319 Wis. 2d 274, 767 N.W.2d 898. They are not to be construed farther than the contract language absolutely requires, and are to be construed in favor of the employee. ***Id.*** Wisconsin courts have interpreted WIS. STAT. § 103.465 as establishing five requirements that a restrictive covenant must meet in order to be enforceable under Wisconsin law. ***Id.***, ¶20.

> A restrictive covenant must: (1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the employee; and (5) not be contrary to public policy.

Id.

¶13 Guido argues the nonsolicitation clause of the employment agreement fails to withstand WIS. STAT. § 103.465's close scrutiny because it is overbroad for failing to sufficiently define "client" or "business contact."[6] Guido's primary argument is that Wein could not concretely define client in his

[6] Heafy makes no independent argument that the restrictive covenants are unenforceable. However, his brief states he agrees with Guido's arguments.

deposition. Wein's testimony, however, is irrelevant. We are concerned only with the language of the contract.

¶14 Guido also observes that both terms include any entity with which Guido had contact with during his employment, and asserts, "This is impermissibly broad compared to [***Star Direct***'s] definition of client, *i.e.*, a client of whom the former employee had 'special knowledge.'" ***Star Direct***, however, did not create any rules for defining customers or clients; it merely addressed the facts present in that case. Regardless, the definition there was just as broad. Contrary to Guido's selective representation, the covenant in ***Star Direct*** prohibited certain contact with any customers "'for which Employee performed services or otherwise dealt with' or 'obtained special knowledge' about in the course of employment." ***Star Direct***, 319 Wis. 2d 274, ¶23.

¶15 Finally, Guido appears to argue that because there is no look-back time restriction for when he had contact with the client or business contact at Key Railroad, this extends the one-year nonsolicitation clause indefinitely.[7] Guido is mistaken. The one-year prohibition commences when he leaves employment, and terminates one year later. There is nothing indefinite about it.

¶16 Guido has failed to develop any legitimate argument that the restrictive covenants were somehow unnecessary or unreasonable.[8] Key Railroad,

[7] It is not entirely clear what Guido is arguing, but this is our best attempt at comprehending it. To the extent we have misinterpreted the argument, Guido's failure to adequately develop his argument relieves us of any obligation to address it. *See* ***Flynn***, 190 Wis. 2d at 39 n.2 (we may disregard issues that are inadequately briefed).

[8] Guido argues the confidentiality clause is also unenforceable, because it is textually linked to the unenforceable nonsolicitation clause. Because we reject his argument as to the nonsolicitation clause, we need not address this argument.

on the other hand, argued the necessity and reasonableness of the covenants at great length. Guido therefore concedes the issue of enforceability. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

Whether Key Railroad produced sufficient facts to preclude summary judgment

¶17 Guido and Heafy argue that, even if the restrictive covenants are enforceable, there is no evidence on which a jury could reasonably rely to conclude they violated them. We disagree.

¶18 To summarize, the nonsolicitation clauses prohibited Guido and Heafy from (a) soliciting or accepting any business from those current Key Railroad clients with which they had contact during their employment, if such business would constitute competition with Key Railroad, or (b) requesting or advising any clients, suppliers, or business contacts, with whom they had contact during employment and with which Key Railroad has a current business relationship, to withdraw, curtail, or cancel any business relations with Key Railroad.

¶19 Jacob Karamol, a preconstruction manager at Duke Construction, averred he hired Guido and/or Via Rail to perform oversight services and act as the owner's representative for a Duke Construction-Northlake project during the restricted period. Karamol further explained, however, that Key Railroad continued to be engineer of record on the Northlake project and maintained its design contract with Duke. He also asserted Guido's work did not affect the work Duke hired Key Railroad to perform. Guido asserted he did not provide any engineering services.

¶20 We reject Key Railroad's assertion that the foregoing evidence "establishes the fact that Guido performed work for one of [Key Railroad's] customers during the restricted period, in violation of Guido's contract." Nonetheless, we cannot conclude that Guido absolutely did not perform any services that competed with Key Railroad. Both companies provided consulting services to the railroad industry; that they did not provide the same services on the Northlake project does not preclude a finding that Key Railroad could have provided some or all of the services that Guido/Key Railroad provided on that project. While the facts appear only minimally developed concerning the parties' respective responsibilities and areas of expertise, any doubt as to the existence of a material dispute of fact must be resolved in Key Railroad's favor as the nonmoving party.

¶21 Key Railroad also asserts Guido violated the nonsolicitation clause with regard to Plastics Logistics Group, LLC. That company's president, Graham Brisben, averred Plastics Logistics hired Guido and/or Via Rail as a consultant on two separate projects in 2006. Brisben claims that prior to contacting Guido in 2006, he had already decided to cease working with Key Railroad, allegedly for performance reasons. However, this fact, even if accepted, would not establish a defense to the nonsolicitation clause. The clause prohibited Guido from providing competing services to any of Key Railroad's clients, regardless of the reason the client chose to work with Guido rather than Key Railroad. Moreover, Key Railroad argues Brisben's assertion is suspect because Guido was the person at Key Railroad who either provided or supervised the services to Plastics Logistics before Guido left. Thus, if truly unsatisfied with Guido's work at Key Railroad, it would be curious that Plastics Logistics would then turn to Guido at Via Rail. Additionally, in contrast to Brisben's assertion that Plastics Logistics hired Guido/

Via Rail for only two projects, Via Rail's records indicate six projects with Plastics Logistics.

¶22 The evidence suggests material issues of disputed fact as to whether Guido solicited or accepted business from Plastics Logistics while it was a client of Key Railroad and whether Guido requested or advised Plastics Logistics to curtail or terminate its "business relations" with Key Railroad while the two companies maintained a "business relationship." Guido's and Brisben's self-serving denials are not dispositive. A jury might reasonably make the necessary inferences from the timing of Guido's departure and his work for Plastics Logistics. Again, any questions regarding the existence of a material question of fact must be resolved in Key Railroad's favor.

¶23 Finally, there is a material issue of fact concerning Union Pacific. Key Railroad identifies Union Pacific as a "referral source." Key Railroad explains generally, by way of affidavits, that the rail carrier on a project (e.g., Union Pacific) would refer the prospective client to an engineering firm to provide rail-related engineering and design services, and the engineering firm would then be in a position to offer overall site civil engineering and design services to the client. Wein averred that in order to induce him to invest in Guido's planned new venture when Key Railroad was formed, Guido told Wein that his value was in the relationship he had with Union Pacific. Wein asserted Guido told him that his relationship with Union Pacific was the real reason for forming Key Railroad and handing over the management to Guido. As soon as Guido terminated his employment with Key Railroad and formed Via Rail, Union Pacific stopped referring projects to Key Railroad. Guido and Via Rail, on the other hand, had multiple projects with Union Pacific during the prohibited time period. This is ample evidence to create an issue of fact as to whether Guido violated the

nonsolicitation clause, whether Union Pacific is considered a "client" under paragraph a or b, or merely a "business contact" under paragraph b.[9] Guido's failure to admit violating the nonsolicitation clause is not fatal to Key Railroad's claims; there is no prohibition against relying on circumstantial evidence. Indeed, "'circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.'" ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2011 WI App 101, ¶56, 335 Wis. 2d 151, 801 N.W.2d 781 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)).

¶24 Turning to Heafy, Key Railroad alleges only one instance of violating the nonsolicitation clause. Heafy had been the main contact between Key Railroad and Knapp Railroad, and had worked as the project manager on all of the Knapp Railroad projects during his employment with Key Railroad. The last project Heafy worked on with Knapp Railroad as a Key Railroad employee was the Knapp Railroad/Bucyrus Erie project. After Heafy left in 2007, Key Railroad had no further work from Knapp Railroad. In contrast, Via Rail had nine different projects with Knapp Railroad between 2007 and 2008, including work on the Knapp Railroad/Bucyrus Erie project.

¶25 Heafy responds that summary judgment is mandated by his averment that "he did not for a one-year period after leaving Key Railroad try to solicit customers of Key Railroad; indeed, his job duties at Via Rail during the one year period did not involve 'soliciting business from anyone.'" A jury need not, however, accept Heafy's self-serving statement. Moreover, it fails to address

[9] While we need not resolve the issue here, it would appear that a jury would be in the best position to determine whether Union Pacific was a "client" of Key Railroad.

whether Heafy *accepted* business from a client, or requested or advised Knapp Railroad to withdraw, curtail, or cancel any business relations with Key Railroad. Viewing the evidence and all reasonable inferences therefrom in Key Railroad's favor, an issue of material fact exists as to whether Heafy violated both portions of the nonsolicitation clause.

By the Court.—Judgment and order reversed and cause remanded.

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