COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2941 **Cir. Ct. No. 2012CV549**

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

MATENAER CORPORATION,

PLAINTIFF-RESPONDENT,

V.

THOMAS PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: TODD K. MARTENS, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Thomas Peterson, a former sales representative for Matenaer Corporation, appeals a judgment entered after a bench trial in which the circuit court awarded Matenaer approximately $71,500 in damages on Matenaer's claims against Peterson. The circuit court concluded that Peterson breached an

implied agreement with Matenaer to repay advances made to Peterson. In addition, the court concluded that Peterson breached a duty of loyalty to Matenaer, and interfered with Matenaer's contractual relationship with a customer, by secretly working for a Matenaer competitor and diverting the customer's business to the competitor.

¶2 Peterson argues that the circuit court erred by: (1) failing to apply the "***Shaler*** rule,"[1] which requires that an agreement to repay advances be express; (2) finding that Peterson breached a duty of loyalty; (3) allowing Matenaer to receive lost profit damages for more than 60 days after the date Peterson claims he first notified Matenaer that he was terminating his contract; (4) calculating damages based on "theoretical" lost profits instead of "actual" lost profits; and (5) dismissing Peterson's counterclaims. We reject these arguments and affirm.

Discussion

*1. **Shaler** Rule Requiring That Agreement To Repay Advances Be Express*

¶3 The circuit court found that Peterson and Matenaer entered into a contract that was only partially reduced to writing. As to Peterson's monthly advances, the circuit court found that the parties' course of conduct established an implied agreement that the advances would be repaid by Peterson as Peterson earned sales commissions. Accordingly, the circuit court awarded Matenaer $4,668.51 in breach-of-contract damages, based on the amount of Peterson's outstanding advances.

[1] ***Shaler Umbrella Co. v. Blow***, 199 Wis. 489, 227 N.W. 1 (1929).

¶4 Peterson argues that he is not liable to repay the advances because, under ***Shaler Umbrella Co. v. Blow***, 199 Wis. 489, 227 N.W. 1 (1929), an agreement to repay advances must be express. Peterson argues that the circuit court erred by relying on an exception to ***Shaler*** that is set forth in ***Larson v. Watzke***, 218 Wis. 59, 259 N.W. 712 (1935). We are not persuaded.

¶5 The exception in ***Larson*** is that, "if an agent rescinds, abandons, or otherwise disqualifies himself from continuing to perform his contract, he may be liable for advances made in excess of his credit for commissions." ***Id.*** at 61. Matenaer argues that Peterson "abandoned" his contract with Matenaer within the meaning of ***Larson*** in January 2011 when Peterson, without Matenaer's knowledge, ceased efforts to sell Matenaer's products and began working for Matenaer's competitor.

¶6 Peterson argues, as we understand it, that the ***Larson*** exception must be construed narrowly. He asserts that "[r]esignation or termination by an at-will employee cannot be an exception to the [***Shaler***] rule, or else the exception would swallow up the rule." But Peterson's case does not involve mere resignation or termination. As we have noted, the circuit court found that Peterson breached his contract and engaged in tortious conduct by secretly ceasing sales efforts for Matenaer and working instead for a Matenaer competitor. Thus, there is no exception-swallows-the-rule problem here. If Peterson means to argue that his actions did not satisfy the ***Larson*** exception, even if ***Larson*** is narrowly construed, Peterson fails to make a developed, persuasive argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

¶7 Peterson also contends that ***Larson*** does not apply here because the out-of-state cases that ***Larson*** cites involved sales agents who, unlike Peterson, had a set-term contract or had abandoned a contract while still receiving advances.[2] Putting aside whether these factual differences mattered to the analyses in those cases, we see nothing in ***Larson*** itself suggesting that these differences matter. And, obviously, those out-of-state cases are not binding.

¶8 In sum, Peterson fails to persuade us that the circuit court should have applied ***Shaler*** to conclude that Peterson was not liable for the advances without an express agreement to pay them back.

2. Breach Of Duty Of Loyalty

¶9 As noted above, the circuit court concluded that Peterson breached a duty of loyalty to Matenaer by secretly working for Matenaer's competitor and directing a Matenaer customer to that competitor. Underlying this conclusion were several factual findings, including the following. First, the circuit court found that Peterson had agreed, as part of his contract with Matenaer, not to represent companies that manufactured competing lines of products. Second, the court found that Peterson, without Matenaer's knowledge, began working for Matenaer's competitor and diverting business from Matenaer to the competitor in January 2011. Finally, the court found that Peterson did not notify Matenaer that Peterson was terminating his contract with Matenaer until November 2011.

[2] Matenaer had discontinued Peterson's advances before Peterson started secretly working for Matenaer's competitor.

¶10 Peterson's arguments are fact based. He does not seriously dispute that the effect of the court's findings, if sustained, would be to establish that Peterson violated his duty of loyalty to Matenaer for at least 11 months, ending when, according to the circuit court's findings, Peterson first notified Matenaer that he was terminating his contract.

¶11 In arguing that he did not breach a duty of loyalty, Peterson makes three sub-arguments. As we have noted, these sub-arguments are challenges to the circuit court's fact finding, and we address them as such in the sections below.[3]

¶12 We will not set aside the circuit court's findings of fact unless those findings are clearly erroneous. ***Mentzel v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). Moreover, "[w]hen the circuit court sits as factfinder, it is the ultimate arbiter of the weight and credibility afforded to the evidence." ***Bonstores Realty One, LLC v. City of Wauwatosa***, 2013 WI App 131, ¶33, 351 Wis. 2d 439, 839 N.W.2d 893.

a. First Sub-Argument: The Time When Peterson First Informed Matenaer That Peterson Was Terminating The Parties' Contract

¶13 Peterson challenges the circuit court's finding that his obligation of loyalty lasted until at least November 2011 because it was not until then that Peterson informed Matenaer that he was terminating his contract with Matenaer. According to Peterson, this finding is a "false premise" underlying the circuit court's determination that Peterson breached a duty of loyalty. Peterson argues, as

[3] To the extent Peterson may be making additional supporting arguments, we deem those arguments undeveloped and do not address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

we understand it, that the evidence overwhelmingly showed that Peterson informed Matenaer in December 2010 that he was terminating his contract with Matenaer. We conclude that the evidence supports the circuit court's view of the facts.

¶14 Peterson relies on his testimony regarding a phone conversation that he had with Matenaer's president, Warren Stringer, in December 2010. Peterson testified that, during the conversation, he proposed a new commission arrangement, which Stringer did not accept. In addition, Peterson testified that he told Stringer during that same phone conversation that Peterson "cannot continue at this point."

¶15 While this testimony could have supported a finding that Peterson notified Matenaer in December 2010 that Peterson was terminating the contract, Peterson is essentially just arguing evidence that supports his preferred fact finding and ignoring evidence that supports the circuit court's contrary finding, namely, Stringer's testimony. The circuit court's decision makes clear that the court credited Stringer's version of events over Peterson's.

¶16 Stringer testified that, although Peterson expressed dissatisfaction during the December 2010 phone conversation, the gist of the conversation was that the parties ultimately agreed that the contractual relationship would remain "in-tact." Supporting this view of the conversation is Stringer's further testimony that, after December 2010, the relationship continued. Stringer testified that Peterson did not subsequently object or inform Matenaer that Peterson was terminating his contract even though Matenaer continued to send Peterson monthly statements applying Peterson's earned commissions to his outstanding advance balance. According to Stringer's testimony, it was not until November

2011 that Matenaer received information suggesting that Peterson had secretly stopped representing Matenaer and started working for Matenaer's competitor.

b. Second Sub-Argument: Indefinite Contract Term

¶17 Peterson asserts that a contract is not enforceable if an essential term is vague or indefinite. He argues that, here, there was no meeting of the minds on the essential term of how he would be compensated after December 2010. Again, Peterson's argument runs aground on the circuit court's fact finding. The circuit court found that, even though Peterson was no longer receiving advances as of December 2010, Peterson agreed at that time to continue applying his earned commissions to his outstanding advance balance, with the understanding that he would pay off the balance and then start receiving income again. Peterson does not show that this finding was clearly erroneous.

c. Third Sub-Argument: Peterson Was A Mere "Middleman" With No Exclusivity Arrangement

¶18 Peterson's third sub-argument is that he owed no duty of loyalty to Matenaer because he was only a "middleman," as that term was used in ***Bockemuhl v. Jordan***, 270 Wis. 14, 70 N.W.2d 26 (1955), and because he never agreed to exclusively represent Matenaer. As we understand it, this sub-argument depends on both propositions being true. That is, Peterson does not avoid a duty of loyalty unless he both is a "middleman" and never agreed to exclusively represent Matenaer.

¶19 Once again, Peterson's argument fails in the face of the circuit court's fact finding. As we have noted, the circuit court found that Peterson agreed not to represent companies that manufactured competing lines of products. This is just another way of saying that Peterson agreed to exclusive representation

with respect to the products at issue. Peterson argues that this finding is unsupported by the evidence. We disagree; this finding is supported by the testimony of Matenaer's president, Stringer. Stringer testified that he discussed the exclusivity issue with Peterson, and that the parties orally agreed that Peterson would not represent companies that manufactured competing products. The circuit court acknowledged but discredited Peterson's contrary testimony.

3. Damages For More Than 60 Days After Peterson's Claimed Termination Notice Date

¶20 Peterson argues that he was required to give Matenaer no more than 60 days' notice that he was terminating the parties' contract and, therefore, Matenaer's damages should have been limited to a 60-day period starting in December 2010. Peterson argues that Matenaer suffered no damages during this particular 60-day period. This argument fails because, as we have already explained, the circuit court reasonably found that Peterson did not provide notice until November 2011.

4. Calculation Of Damages Based On "Theoretical" Lost Profits Instead Of "Actual" Lost Profits

¶21 The circuit court awarded Matenaer $66,792 in lost profits as damages for Matenaer's tort claims against Peterson. The court based the amount on the testimony and written report of Matenaer president Stringer.

¶22 The calculation methodology for these damages was as follows. Stringer began with the undisputed assumption that Peterson brought in business from essentially one major customer, Minnesota Rubber, for about 38 months. Stringer calculated Matenaer's average monthly gross revenue from Minnesota Rubber for that period. Stringer then estimated that, absent Peterson's

misconduct, Minnesota Rubber would have continued to provide Matenaer with similar amounts of business for 36 months. Finally, Stringer deducted Matenaer's production costs and Peterson's commission percentage to arrive at a net lost profit amount of $218,595 for a 36-month period.

¶23 The circuit court based its damages award on Stringer's calculations, except that the court awarded lost profits for only 11 months. The court rejected Stringer's 36-month time period and instead looked to the amount of time during which Peterson had secretly stopped making sales for Matenaer and worked instead for Matenaer's competitor. Thus, the circuit court reduced Stringer's $218,595 figure to $66,792 ($218,595 ÷ 36 x 11 = $66,792.92).

¶24 Peterson argues that the circuit court erred by calculating damages based on "theoretical" instead of "actual" lost profits. As we understand it, this argument consists of three further sub-arguments. None are persuasive.

¶25 First, Peterson argues that the circuit court erred by failing to deduct the revenues that Matenaer actually received from Minnesota Rubber during the January to November 2011 period. However, it is not apparent why this deduction would have been appropriate. Peterson does not dispute that these revenues were generated by Peterson's pre-January 2011 sales efforts and that there was generally a lead time between his sales efforts and the revenues that those sales generated. Thus, the circuit court logically awarded damages based on the eventual lost profits caused by Peterson's behavior during the January to November 2011 period, not based on revenue received during that period.

¶26 Second, Peterson argues that the circuit court should have made adjustments to Stringer's calculations to account for factors that might have reduced Matenaer's average monthly net profits, such as Matenaer's bonus and

profit-sharing programs. However, Peterson points to *no* evidence suggesting that those factors would have made a meaningful difference in the damages calculation. Thus, we agree with Matenaer that the circuit court reasonably decided not to give weight to such factors.

¶27 Third, Peterson argues that, instead of measuring lost profits based on Stringer's calculations, the circuit court should have measured lost profits based on the amount of business that Peterson actually diverted to Matenaer's competitor during the relevant time period. However, at best, this is just a competing reasonable approach to calculating damages. Peterson provides no authority or explanation as to why it is required. We therefore reject this argument.

5. Peterson's Counterclaims

¶28 Peterson brought counterclaims against Matenaer for unjust enrichment, quantum meruit, and a violation of the Minnesota Termination of Sales Representative Act. The circuit court dismissed these counterclaims. Peterson argues that, if we reverse the circuit court on Matenaer's claims, then we should remand for further proceedings on Peterson's dismissed counterclaims. Because we do not reverse on Matenaer's claims, we need not address Peterson's counterclaims.

Conclusion

¶29 For the reasons stated above, we affirm the judgment against Peterson.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).