COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1789 **Cir. Ct. No. 2013CV517**

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

BACKUS ELECTRIC, INC.,

PLAINTIFF-APPELLANT,

V.

HUBBARTT ELECTRIC, INC., JASON L. HUBBARTT, JOHN M. LEPICH AND JOSEPH D. STAUFFER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Backus Electric, Inc. appeals from an order dismissing its claims that three former employees, Jason Hubbartt, John Lepich, and Joseph Stauffer, breached a union contract and were unjustly enriched when they abruptly left their employment with Backus and started working for Hubbartt

Electric, Inc. Backus argues that the circuit court prematurely stayed discovery and thereby cut off its ability to offer evidence in opposition to the summary judgment motion and that it has viable claims for breach of contract and unjust enrichment. We affirm that part of the order dismissing the breach of contract claim, reverse the dismissal of the unjust enrichment claim, and remand for further proceedings.

¶2 Hubbartt, Lepich and Stauffer worked for Backus as union electricians until April 2013. When Hubbartt was terminated he started Hubbartt Electric, Inc. Lepich and Stauffer then left Backus and began working for Hubbartt Electric. Backus commenced this action claiming that the former employees planned or engaged in competing business while still in Backus's employ and thereafter utilized proprietary information gained through their employment to compete with Backus. Nine causes of action were alleged.[1]

¶3 After the action was started, Hubbartt was deposed.[2] Discovery requests and objections were pending when the employees moved for partial summary judgment dismissing the claims of breach of the union contract and unjust enrichment. At the hearing on discovery motions, the employees requested a stay of discovery pending the outcome of their partial summary judgment

[1] Backus's complaint alleged breach of fiduciary duty and duty of loyalty, aiding and abetting a breach of duties, breach of union contract, tortious interference with contractual relationships, unjust enrichment, violation of WIS. STAT. §§ 134.90 and 134.01 (2013-14), civil conspiracy, and a claim for punitive damages.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Hubbartt's deposition was started but not finished.

motion. The circuit court stayed all discovery, including scheduled depositions of Hubbartt, Lepich and Stauffer.

¶4 Ultimately the circuit court granted the employees' partial summary judgment motion. It concluded that there was no cause of action under the union contract because there was no contract privity and the contract required other remedies. With respect to the unjust enrichment claim, the court determined that Backus had made no showing that the employees took any trade secrets with them. It concluded that there was no cause of action for unjust enrichment when based on nothing more than the employees' use of training and experience gained on the job. Backus's petition for leave to appeal the partial summary judgment order was granted. WIS. STAT. RULE 809.50.

¶5 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principal is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2).

¶6 As to the unjust enrichment claim, Backus argues that it was not allowed discovery necessary to oppose the motion for summary judgment. Thus we examine the circuit court's decision to stay discovery.[3] The circuit court

[3] The employees argue that Backus's appeal of the circuit court's order staying discovery is untimely because the petition for leave to appeal was not filed until after the ruling on the summary judgment motion. The issue is properly before this court. The issue was raised in the petition for leave to appeal, and the petition was granted without any restriction as to the issues raised.

exercises its discretion in granting a motion to stay discovery. *Cf.* ***State v. Beloit Concrete Stone Co.***, 103 Wis. 2d 506, 511, 309 N.W.2d 28 (Ct. App. 1981) (the decision to grant a protective discovery order is discretionary). Similarly, the circuit court exercises its discretion in determining if sufficient discovery has occurred before ruling on a motion for summary judgment. *See* ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 865, 541 N.W.2d 803 (Ct. App. 1995); ***Mathias v. St. Catherine's Hosp., Inc.***, 212 Wis. 2d 540, 554-55, 569 N.W.2d 330 (Ct. App. 1997). A proper exercise of discretion is made if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 772, 582 N.W.2d 98 (Ct. App. 1998). "[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." ***State v. Hutnik***, 39 Wis. 2d 754, 764, 159 N.W.2d 733 (1968).

¶7 The motion to stay discovery came before the circuit court as an oral request at the hearing to consider discovery disputes. Not only did Backus not have any notice that the request would be made, Backus had not yet seen the partial summary judgment motion filed two days before the hearing. The circuit court granted in part Backus's motion to compel answers to interrogatories but then stayed all discovery. In granting the request to stay discovery, the circuit court only considered that the scheduled depositions of the employees were only a month before the anticipated decision on the summary judgment motion. It appears the circuit court wanted to put off further disagreements about the scope and breadth of discovery in the event the issues were narrowed by granting partial summary judgment. The court did not consider what impact the stay of discovery would have on the pending summary judgment motion and the need to create a

record on that motion. Although there may be a preference to take up summary judgment early in the action to conserve judicial resources, *see* ***Jorgensen***, 218 Wis. 2d at 773, there was no consideration here of whether the motion for partial summary judgment only presented questions of law not needing any factual development. The circuit court's decision was not reasonable in light of the pending motion for partial summary judgment. *See* ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis. 2d 131, 146, 513 N.W.2d 609 (Ct. App. 1994) (additional discovery appropriate after determination of standing to raise claim); ***A&B Pipe and Supply Co. v. Turnberry Towers Corp.***, 500 So.2d 261, 262 (Fla. Dist. Ct. App. 1986) (premature to grant summary judgment when plaintiff was unable to depose defendants).

¶8 Backus's complaint alleged that the employees used Backus's trucks, cell phones, credit accounts, tools and other resources to do work not benefitting Backus. Its unjust enrichment claim alleged that the employees were provided with training, introductions to Backus's customers, and valuable information about the customers' electrical needs and that Hubbartt and Hubbartt Electric received a benefit by taking key employees with such training and information. In support of summary judgment, the employees filed affidavits stating that they did not take any client list or other property of Backus when they left and that they knew customers by memory and could look them up in the phonebook. The employees argued that for a viable unjust enrichment claim there must be proof that retention of the benefit conferred be inequitable and that it is not inequitable for the employees to retain and use training, knowledge, and information gained in the long-time service of the employer. We agree that to the extent Backus's unjust enrichment claim is based solely on the employees' retention of training, experience, and knowledge, no claim of inequity lies. *See*

Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis. 2d 202, 214, 267 N.W.2d 242 (1978) ("[S]o long as a departing employee takes with him no more than his experience and intellectual development that has ensued while being trained by another, and no trade secrets or processes are wrongfully appropriated, the law affords no recourse.").

¶9 The circuit court properly recognized that Backus needed to show the appropriation of trade secrets or other property. It determined that Backus failed to meet his burden of proof under circumstances in which Backus had no opportunity to depose the employees and ferret out what they may or may not have taken upon leaving their employment. At the hearing on the summary judgment motion, Backus indicated that it had just become known that Lepich took some computer programs when he left. Because discovery was stayed, there had been no opportunity for Backus to determine if the employees had taken other documents or computer programs that might constitute trade secrets or other property supporting an unjust enrichment claim. In short, without Backus having an opportunity for discovery it was premature to determine that Backus had failed to meet its evidentiary burden. We reverse that part of the order granting summary judgment dismissing the unjust enrichment claim.

¶10 We turn to the dismissal of Backus's claim that the former employees breached the contract between Backus and the union by performing and being compensated for "side work" while still employed at Backus. The claim is based on Article V, sec. 5.01: "No employee while he remains subject to employment by Employers operating under this Agreement, shall himself become a contractor for the performance of any electrical work." Summary judgment dismissing this claim was not affected by the stay of discovery because the claim is not properly brought in the circuit court.

¶11 Article II of the contract is titled "Grievances-Disputes." Section 2.01 provides that there shall be no stoppage of work by strike or lockout because of "dispute over matters relating to this Agreement," and that "[a]ll such matters must be handled as stated herein." Section 2.03 provides that all grievances or questions in dispute that cannot be settled by the parties be referred to the local "Labor-Management Committee." Under sec. 2.05, if the committee is unable to adjust a dispute, it is then referred to the "County on Industrial Relations for the Electrical Contracting Industry," and the decision of that body is final and binding on the parties.

¶12 We are not persuaded by Backus's argument that the grievance procedure set forth in the contract is only applicable to claims that might be remedied by strike or lockout. The contract is not ambiguous in requiring all matters relating to the contract be referred to the local Labor-Management Committee. "Grievance and arbitration procedures included in a collective bargaining agreement are presumed to be exclusive remedies unless the parties to the agreement expressly agree they are not." ***Gray v. Marinette Cnty.***, 200 Wis. 2d 426, 436, 546 N.W.2d 553 (Ct. App. 1996). There is no such express agreement here. Backus may not bring a circuit court action on the contract without first using the contract remedy, and the circuit court properly dismissed the breach of contract claim. ***Milwaukee Deputy Sheriffs' Ass'n v. County of Milwaukee***, 2010 WI App 109, ¶10, 328 Wis. 2d 231, 789 N.W.2d 394. We affirm that part of the summary judgment order dismissing the breach of contract claim.

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

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