COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2036

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

MORGAN MUSIC, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

MICHAEL SCHLENKER, D/B/A SPEED OF SOUND,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Morgan Music, Inc., appeals a judgment that dismisses its claim against Michael Schlenker, d/b/a Speed of Sound. Morgan sought injunctive relief and damages for breach of a non-compete agreement. On

appeal, Morgan contends that the trial court erroneously interpreted the non-compete agreement. Schlenker cross-appeals, raising just one issue: whether sufficient evidence supports the trial court's finding that Morgan paid consideration for the non-compete agreement.

We conclude that the record reveals consideration was paid, but that the court applied an incorrect analysis when it interpreted the agreement. As a result, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

At one time, Schlenker was one of three owners of a music store known as Side by Side Pro Audio, which sold musical instruments, amplifiers, public address systems, and lighting systems. Schlenker formerly worked for Morgan Music, an established music store that sells and rents musical instruments and sells amplifiers, public address systems, and lighting systems. In October 1994, Morgan Music bought Side by Side for $62,275.79, broken down as follows:

$26,929.39	Inventory
$ 1,000.00	Fixtures
$ 4,346.40	Repair parts
$30,000.00	"Assets listed above and all other rights" of the business.

Morgan maintained that the $30,000 included payment for the non-compete agreement. The agreement provided:

> WHEREAS, the Company buying substantial assets of Seller desires that Seller not provide services or have any interest in any retail music business except as defined below in the Company's market area, and Seller is willing

> to agree to such restrictions on the terms and conditions set forth in this Agreement.
>
> ….
>
> 1. … Seller shall not … engage or be interested … in the "restricted business" ….
>
> 2. The term "restricted business" means any business any part of which consists principally of selling at retail musical instruments, equipment or music other than the Company.

In May 1996, Schlenker opened a new business that became known as Speed of Sound, which undisputedly violated the geographical and temporal limits of the non-compete agreement.[1] Speed of Sound primarily sells, installs and maintains public address and lighting systems. As the trial court found:

> It is conceded by Schlenker that the systems he installs can be used to project voice or music. Schlenker testified the systems he installs are used by churches, bars, or any other facility which requires sound magnification. According to the testimony, these systems are expensive, high quality and special order.

Morgan initiated this suit claiming that Schlenker violated the non-compete agreement. Schlenker defended on several grounds, including that he sold sound reinforcement equipment, not musical equipment.[2] Schlenker introduced two witnesses who testified that public address systems and sound reinforcement equipment is not the same as musical equipment. One witness stated, "There's a fine line that sometimes is hard to understand." He explained that a "guitar amp is basically used just to amplify a guitar," but a "public address

[1] The agreement continued for a three-year period within 20 miles of the City of Eau Claire.

[2] At trial, the parties agreed that the term "equipment" as used in the non-compete agreement meant "musical equipment." They did not agree, however, as to what equipment is included within the term "musical equipment."

system is made to amplify a lot of different things which could be a voice" or music.

The trial court concluded that the agreement was valid and was supported by consideration and, relying on the definition provided by witnesses, concluded that the equipment Schlenker sold was not musical equipment. Because the trial court determined that Schlenker did not breach the non-compete agreement, it did not rule on the issue of damages. The trial court dismissed Morgan's claim, and this appeal and cross-appeal followed.

Morgan argues that the trial court erroneously interpreted the contract to determine that Schlenker did not sell musical equipment. We conclude that the court erred in its contract analysis because it failed to ascertain what the parties intended "musical equipment" to mean. We begin with the general rules of contract construction. The meaning of an unambiguous contract is a question of law. ***Schlosser v. Allis-Chalmers Corp.***, 86 Wis.2d 226, 244, 271 N.W.2d 879, 887 (1978). The object of contract construction is to ascertain the intent of the contracting parties, and we first look to the language used by the parties to express their agreement. ***Bank of Barron v. Gieseke***, 169 Wis.2d 437, 455, 485 N.W.2d 426, 432 (Ct. App. 1992). We do not consider extrinsic evidence unless the contract is ambiguous. *See* ***Capital Invests. v. Whitehall Packing Co.***, 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979).

Whether the contract is ambiguous presents a question of law to be decided independently of the trial court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). A contract is ambiguous if its terms are susceptible to more than one reasonable interpretation. ***Wilke v. First Fed. S&L Ass'n***, 108 Wis.2d 650, 654, 323 N.W.2d

179, 181 (Ct. App. 1982). If a contract is ambiguous, the trial court's duty is to determine the parties' intent at the time of making the contract, which becomes a question of fact. *See* ***Patti v. Western Machine Co.***, 72 Wis.2d 348, 353, 241 N.W.2d 158, 161 (1976).

Here, the contract is ambiguous. The parties offered conflicting definitions of the term "musical equipment." Morgan Music contends that the term included sound reinforcement equipment, while Schlenker argues that it does not. Because the term musical equipment is reasonably susceptible to more than one interpretation, it is ambiguous. Thus, the issue whether, at the time they entered into their contract, the parties intended the term “musical equipment” to include sound reinforcement equipment became a question of fact for the trial court to determine.

The trial court, however, did not address the issue of the parties' intent. The record indicates that the parties treated the issue of intent at the time of contracting somewhat obscurely at trial and did not squarely address it. As a result, the trial court treated the contract as if it were unambiguous and applied a definition offered by one of the parties' witnesses. Because the trial court misapplied the rules of contract construction, we reverse. Because the parties' intent is an issue of fact and an appellate court does not find facts, we must remand for a new trial on the issues of the parties' intent, and, if necessary, depending on the court’s finding on intent, whether there was a breach and damages.

On cross-appeal, Schlenker raises one issue: whether the evidence supports the trial court's finding that Morgan paid consideration for the

non-complete agreement. Schlenker relies on the following language found in the purchase agreement:

> As and for significant consideration for the sale contemplated by this Agreement, the Seller and its individual shareholders agree to execute the Covenant Not to Compete attached here as Exhibit 5 in favor of the Buyer at closing.

Schlenker argues that the agreement fails to define the consideration. He contends that the agreement is silent on this issue and that there is only one conclusion—that no consideration was paid for the covenant not to compete. We disagree.

Schlenker fails to identify any authority for his proposition that the agreement itself must identify the consideration paid. Schlenker relies on one case, ***NBZ, Inc. v. Pilarski***, 185 Wis.2d 827, 520 N.W.2d 93 (Ct. App. 1994). ***NBZ*** holds that covenants not to compete must be supported by consideration and that an exchange of promises may constitute consideration for a bilateral contract. ***Id***. at 838, 520 N.W.2d at 96-97. Also, the "party seeking to avoid a contract has the burden of proving failure of consideration." ***Id***. at 838, 520 N.W.2d at 97. Whether consideration supports a contract presents a question of fact. ***Id***. We must uphold the trial court's findings of fact unless clearly erroneous. ***Id***. at 839, 520 N.W.2d at 97.

We hold that the trial court's findings were not clearly erroneous and support its conclusion that the covenant was supported by consideration. The trial court found that the non-compete agreement was included in the $30,000 payment made for assets and "other rights." Morgan Music undisputedly paid $30,000 over and above the price of the tangible assets. As the trial court pointed out:

"Although it is too bad the draftsman of the purchase agreement did not more carefully spell out what the $30,000 was intended to cover, it does appear that about all that was left to purchase of Side by Side was the non-competition of its former shareholders and employees." The record supports this finding, demonstrating that the balance of the $62,275.79 purchase price was attributed to inventory, repair parts and fixtures, and that no other assets were purchased.

Schlenker also argues that the $30,000 was intended to pay for goodwill. He maintains that the settlement statement, identified at trial as exhibit 28, states that the $30,000 payment was for goodwill. We are unpersuaded. The trial court gave little, if any, weight to the settlement statement, stating: "Although Exhibit 28 refers to 'goodwill,' that term is not referred to in the agreement and indeed no one is even sure who prepared Exhibit 28 or what it was to be used for." The trial court, not this court, assesses the weight and credibility of the evidence. Section 805.17(2), STATS.

We conclude that the record supports the trial court's findings that the agreement was supported by valid consideration. However, because the trial court misapplied the rules of contract construction, we reverse that portion of the judgment construing the term "musical equipment" and remand for a new trial on the issues of the parties' intent when using that term.[3]

[3] Morgan Music's appellate brief also addresses the validity of the agreement and the issue of damages. Because Morgan has not identified how it was aggrieved by the court's holding that the agreement is valid, it may not argue it on appeal. *See* ***Ford Motor Credit Co. v. Mills***, 142 Wis.2d 215, 418 N.W.2d 14 (Ct. App. 1987). Also, because the validity of the non-compete was not argued on cross-appeal, we do not address it. *See* ***State v. Huff***, 123 Wis.2d 397, 408, 367 N.W.2d 226, 231 (Ct. App. 1985).

Finally, because the trial court did not address damages, we do not address that issue. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 10-11, 456 N.W.2d 797, 802 (1990).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. Costs on appeal to Morgan Music.

This opinion will not be published. RULE 809.23(1)(b)(5), STATS.