COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2007AP1480 **Cir. Ct. No. 2006CV1173**

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

COTTONWOOD FINANCIAL, LTD.,

PLAINTIFF-APPELLANT,

V.

STACY REID,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Cottonwood Financial, Ltd., appeals a summary judgment dismissing its claim against Stacy Reid. The court dismissed Cottonwood's claim Reid violated a non-compete agreement because it concluded the geographic restraint was too vague. Cottonwood asserts that genuine issues of

material fact preclude summary judgment. We conclude the restrictive covenant's geographical restriction is unduly harsh and oppressive and not necessary for Cottonwood's protection. Accordingly, we affirm the judgment.

¶2 Cottonwood operates multiple payday loan stores throughout Wisconsin. Reid was hired on April 28, 2003, for Cottonwood's Cash ASAP store in Green Bay, but shortly thereafter transferred to The Cash Store, also one of Cottonwood's Green Bay outlets. As part of her hiring paperwork, Reid signed a non-compete agreement stating, as relevant here:

> During employment and for a period of twelve months following the termination of his [or her] employment with the Company for any reason, Employee will not, directly or indirectly, engage in or become associated with, or advise or assist, any business … engaged in providing any services … or conducting business in a Restricted Area, which services are similar to or competitive with any service offered by the Company. … As used herein, "Restricted Area" shall mean (i) an area encompassed by a radius of 50 miles of any office of the Company in which Employee has worked during a period of two years prior to his [or her] termination of employment with the Company….

¶3 During the course of her employment with Cottonwood, Reid filled in at four offices outside Green Bay. She worked at an office in Two Rivers for fifteen days, in Sheboygan for five days, in Hudson for four days, and in Wausau for three days. Reid terminated her employment with Cottonwood on February 13, 2006, to take a job in Green Bay with Check Advance, one of Cottonwood's competitors.

¶4 Cottonwood sued Reid, alleging breach of the non-compete agreement. It sought damages and an injunction enforcing the covenant. Reid

moved for summary judgment, arguing the restrictive covenant was void under WIS. STAT. § 103.465[1] because: (1) its scope was harsh and oppressive; (2) the geographic restriction was unreasonable; (3) the covenant was not necessary for Cottonwood's protection; and (4) the covenant violated public policy.[2]

¶5 The court determined the covenant was unenforceable and granted summary judgment, despite acknowledging several factual disputes. It concluded that because the covenant applied to a fifty-mile radius around any office where Reid had worked, irrespective of how long she worked there, and because at the time of her hire Reid could not have anticipated where she might be asked to work temporarily, "there exists such lack of definition as to the geographic area applicable … that, as a matter of law, the nebulous geographic restriction is unreasonable." Cottonwood appeals.

¶6 We review summary judgments de novo, using the same method as the circuit court. *See* ***General Med. Corp. v. Kobs***, 179 Wis. 2d 422, 432, 507 N.W.2d 381 (Ct. App. 1993). Summary judgment is appropriate when there are no genuine issues of material fact and only questions of law must be decided. ***Id.*** Although somewhat dependent on the facts of each case, the validity of non-compete agreements is ultimately a question of law. ***Aon Risk Servs., Inc. v. Liebenstein***, 2006 WI App 4, ¶17, 289 Wis. 2d 127, 710 N.W.2d 175. Further, we

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Cottonwood then filed an amended complaint with two additional claims. However, when the court dismissed the first claim on summary judgment, the parties stipulated to dismissal, without prejudice, of the two added claims.

may affirm a judgment for reasons other than those stated by the circuit court. *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992).

¶7 WISCONSIN STAT. § 103.465 provides, in part:

> 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.

Restrictive covenants are prima facie suspect; they must withstand close scrutiny to be considered legally reasonable; they are not construed any further than absolutely necessary, and they are construed in favor of employees. ***Streiff v. American Family Mut. Ins. Co.***, 118 Wis. 2d 602, 610-11, 348 N.W.2d 505 (1984).

¶8 To be valid, a covenant not to compete must meet five requirements. "It must: (1) be necessary for the protection of the employer or principal; (2) provide a reasonable time restriction; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy." ***General Med.***, 179 Wis. 2d at 428-29.

¶9 WISCONSIN STAT. § 103.465 also provides: "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." In other words, a covenant is not severable—if even one term is unreasonable, the entire covenant is invalid. *See* ***General Med.***, 179 Wis. 2d at 431.

¶10 The circuit court invalidated the entire agreement because it concluded the geographic restraint was too nebulous and unpredictable—and, therefore, unreasonable—and Reid reiterates this argument on appeal. We are not wholly convinced by this reasoning. The restricted area is defined as "an area encompassed by a radius of 50 miles of any office of the Company in which Employee has worked during a period of two years prior to his [or her] termination of employment with the Company…." This is not particularly ambiguous. Moreover, geographic certainty is not always required, as the supreme court "has held that territorial limits need not be expressed in geographical terms as an absolute prerequisite to a valid and enforceable agreement." ***Id.*** at 433.

¶11 We conclude, however, that the restraint is "harsh or oppressive to the employee" and not completely necessary to protect Cottonwood's interests. Cottonwood, for all its complaints about factual issues, does not dispute that the fifty-mile radius applies not only to the area around Green Bay, but also to areas surrounding Hudson, Wausau, Sheboygan, and Two Rivers. In light of the directives that restrictive covenants are prima facie suspect and subject to close scrutiny, we conclude it is these added areas, derived from the "any office" language, that make the covenant unenforceable.

¶12 Cottonwood asserts that its covenant is necessary because customers build rapport with the individuals behind the counter, not the lending company.[3] Assuming this much is true, Cottonwood has offered no compelling evidence to suggest that Reid, working three to five days in an office, had sufficient time to develop the loyalty of clients. It is absurd for Cottonwood to imply that after three

[3] It is irrelevant that Reid entered a similar non-compete clause with Check Advance.

days in Wausau or four days in Hudson, clients would be prepared to drive up to two hundred miles in one direction simply to follow Reid to Green Bay instead of continuing to do business at the local Cottonwood location.[4] Although we might be prepared to entertain Cottonwood's customer loyalty argument insofar as it should preclude competition in Green Bay, the covenant is either enforceable in its entirety or not at all.[5] We therefore must conclude it is not enforceable at all.

By the Court.—Judgment affirmed.

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

[4] Reid complains the restriction excludes her from working in a majority of the metropolitan areas in Wisconsin and suggests the covenant could force her to move out of state to find employment. The restriction does appear to exclude Reid from seeking employment in several metropolitan areas, including Green Bay, Oshkosh, Wausau, parts of Milwaukee, and a considerable portion of Minneapolis/St. Paul. However, there are several areas that do not appear covered by the covenant, such as Eau Claire, La Crosse, Beloit, Janesville, Wisconsin Dells, Waukesha, Racine, Kenosha, southern suburbs of Milwaukee, and Madison.

[5] We note that Reid also signed a confidentiality agreement as well as a non-solicitation agreement to try to prevent her from siphoning customers from Cottonwood's stores. The company does not claim Reid breached either of these.