COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1592

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

REGAL WARE, INC.,

PLAINTIFF-RESPONDENT,

V.

TSCO CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Order affirmed; judgment reversed and cause remanded.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. This is the second appeal arising out of the business relationship between TSCO Corporation and Regal Ware, Inc. In the first appeal, ***Regal Ware, Inc. v. TSCO Corporation***, 207 Wis.2d 538, 558 N.W.2d 679 (Ct. App. 1996) (***Regal Ware I***), we addressed whether the Wisconsin courts had

personal jurisdiction over TSCO which was named as a defendant in this declaratory judgment filed by Regal Ware. Regal Ware requested a judgment declaring that it had properly terminated its contract with TSCO which obligated it to pay commissions to TSCO under a distributor agreement. We concluded that the Wisconsin circuit court had jurisdiction and remanded for the court to determine, pursuant to § 801.63, STATS., whether the action should be stayed pending resolution of the Pennsylvania action. *See* ***Regal Ware I***, 207 Wis.2d at 540, 558 N.W.2d at 681. On remand, the circuit court denied TSCO's request for a stay. The court further granted Regal Ware's motion for summary judgment, ruling that Regal Ware had properly terminated its contract with TSCO. TSCO appeals.

TSCO first contends on appeal that the trial court should have stayed the Wisconsin proceedings in deference to the Pennsylvania action. Because TSCO failed to demonstrate that substantial justice requires that this action be heard in Pennsylvania, *see* § 801.63(1), STATS., we uphold the court's rejection of TSCO's stay request.

TSCO next contends that the circuit court erred in granting summary judgment because material issues of fact exist surrounding the parties' agreement. Because we agree with TSCO that material issues of fact exist, we reverse the circuit court's order for summary judgment.

BACKGROUND

TSCO and Regal Ware are both Delaware corporations. TSCO has offices in Pennsylvania and Regal Ware has offices in Kewaskum, Wisconsin. Both companies manufacture and distribute cookware and cookware accessories.

TSCO and Regal Ware have had a protracted and complex business history. In 1983, TSCO entered into an agreement with Coronet Housewares, a company that was later purchased by Regal Ware, for the distribution of Coronet products to certain buyers and organizations selling to Japan. Following the 1983 agreement, Regal Ware entered into an agreement with TSCO in 1985 that allowed Regal Ware to make direct sales to one of TSCO's Japanese distributors, Silverware Ltd. (a/k/a Silver Ware Company). In return, Regal Ware would pay TSCO an "overage" of $10 per cookware set sold.

On February 14, 1986, Regal Ware wrote to TSCO regarding its relationship with Silver Ware and confirming a $10 overage and a 2% rebate on the net price of each cookware set sold. The letter also indicated Regal Ware's support for TSCO's conversion of another Japanese distributor, K&K Corporation, to Regal Ware products. On July 18, 1986, Regal Ware wrote to TSCO outlining a commission structure for TSCO based on Regal Ware's relationship with K&K Corporation. This commission structure was revised by a February 2, 1990 agreement between TSCO and Regal Ware. On September 13, 1990, a final agreement was entered into by TSCO and Regal Ware outlining a commission structure for shipments made by Regal Ware to Silver Ware's successor, Ben Corporation.

On October 1, 1990, Regal Ware and TSCO entered into a new agreement again revising the commission structure "for all Direct Sales products sold to K&K Corporation and Ben Corporation in Japan." The agreement further provided, "This agreement supersedes all previous agreements made on commission structures." Approximately four years later, on November 17, 1994, Regal Ware informed TSCO that "[a]s of December 31, 1994, we will no longer work together in any way."

TSCO filed a Praecipe for Writ of Summons and Assumpsit against Regal Ware in Pennsylvania state court on December 20, 1994. On May 8, 1995, Regal Ware filed a request for declaratory judgment in Wisconsin. TSCO moved to stay or dismiss Regal Ware's complaint. On July 20, 1995, TSCO filed a complaint against Regal Ware in Pennsylvania state court alleging that Regal Ware had tortiously interfered with its customers and had breached its contract with TSCO.

On October 15, 1995, the Wisconsin circuit court dismissed Regal Ware's action for lack of personal jurisdiction. Regal Ware appealed and we reversed in ***Regal Ware I***. We remanded for the court to consider TSCO's pending request for a stay. On remand, the court rejected TSCO's stay request. Regal Ware then moved for summary judgment against TSCO and on April 15, 1998, the circuit court granted Regal Ware's request. The court found that the 1990 agreement superseded all other agreements. The court held that because the 1990 agreement was silent as to termination and because TSCO did not have continuing obligations under the agreement, Regal Ware was entitled to terminate the agreement upon reasonable notice. The court further found that the forty-five-day notice provided by Regal Ware was reasonable.

TSCO appeals from both the circuit court's denial of its motion to stay the proceedings and the circuit court's grant of summary judgment.

DISCUSSION

Denial of a Stay

A motion to stay proceedings is committed to the sound discretion of the circuit court. *See* ***U.I.P. Corp. v. Lawyers Title Ins. Corp.***, 65 Wis.2d 377, 386, 222 N.W.2d 638, 643 (1974). A stay should not be granted unless the court

finds that the action "should as a matter of substantial justice be tried in a forum outside this state." *See* § 801.63(1), STATS. In making this determination, the circuit court is directed to consider factors such as: the amenability of the parties to personal jurisdiction here and elsewhere; the convenience to the parties of the two competing fora; differences in rules of conflict of law; and any other factors bearing on the selection of a convenient, reasonable and fair place of trial. *See* § 801.63(3).

"[A] court, having jurisdiction over the parties and the subject matter of an action, ordinarily should adjudicate the litigation before it, and the plaintiff's choice of a forum should rarely be disturbed unless the balance is strongly in favor of the defendant." ***U.I.P. Corp.***, 65 Wis.2d at 386-87, 222 N.W.2d at 643. In applying the factors under § 801.63(3), STATS., we bear in mind that we are reviewing Regal Ware's choice, as a plaintiff, to commence an action in a Wisconsin forum and not TSCO's choice to commence an action in Pennsylvania.

First, TSCO no longer disputes its amenability to personal jurisdiction in both Pennsylvania and Wisconsin. *See* ***Regal Ware I***, 207 Wis.2d at 545, 558 N.W.2d at 682. However, it contends that because the remaining three factors weigh in its favor, the circuit court erred by denying its motion to stay the Wisconsin proceedings. We are unpersuaded.

TSCO contends that it is more convienent to TSCO and its witnesses for the trial to proceed in Pennsylvania. However, Regal Ware contends that it would have been equally inconvenienced by a trial in Pennsylvania. It is evident from the parties' arguments that, wherever this action proceeds, one party and perhaps both will be inconvenienced. We reject TSCO's argument that this factor weighs in favor of a stay.

Next, TSCO argues that, in considering differences in rules of law in the competing fora, the circuit court should have found in favor of a stay. In support, TSCO cites to more favorable law in Pennsylvania than in Wisconsin on the potential legal issues in the case. However, § 801.63(3), STATS., does not speak to the substantive law of the competing fora. Rather, it speaks to the law of conflicts. Because Wisconsin and Pennsylvania both employ the "balancing of contacts" test set forth in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188, this factor does not weigh in favor of a stay. *See* ***Utica Mut. Ins. Co. v. Klein & Son, Inc.***, 157 Wis.2d 552, 556-57, 460 N.W.2d 763, 765 (Ct. App. 1990); ***Knauer v. Knauer***, 470 A.2d 553, 557 (Pa. Super. Ct. 1983) (noting Pennsylvania Supreme Court's adoption of the choice of law rule advocated in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)).

Finally, TSCO contends that there are other factors having a substantial bearing on the place of trial that weigh in favor of a stay. TSCO argues that it was the original plaintiff in the action because it commenced an action first in Pennsylvania. In support, TSCO cites to ***Gulf Oil Corp. v. Gilbert***, 330 U.S. 501, 508 (1947), which states that "the plaintiff's choice of forum should rarely be disturbed." While this is also the law in Wisconsin, *see* ***U.I.P. Corp.***, 65 Wis.2d at 386-87, 222 N.W.2d at 643, TSCO overlooks that *Regal Ware is the plaintiff in the Wisconsin case* and thus, for purposes of our review, TSCO bears the burden of making a convincing showing that substantial justice requires that the action proceed in Pennsylvania. *See* § 801.63(1), STATS.

TSCO additionally contends that the denial of a stay in this case rewarded Regal Ware's "forum shopping" and was generally unfair. However, we do not view Regal Ware's commencement of an action in this state as "forum shopping." As noted by the circuit court, Regal Ware does substantial business in

Wisconsin and has its principal place of business in Washington County, Wisconsin.

As to general fairness, TSCO contends that the circuit court erroneously limited its consideration to inconvenience. However, the court's decision, while focusing on inconvenience, specifically noted its finding that TSCO failed to make a showing under the additional factors.

In order to win a stay, TSCO needed to make a "convincing showing" that a Wisconsin trial would result in substantial injustice. *See* ***U.I.P. Corp.***, 65 Wis.2d at 387, 222 N.W.2d at 643. We conclude that it did not do so. We affirm the circuit court's discretionary decision to deny TSCO's motion for a stay.

Summary Judgment

In reviewing a grant or denial of summary judgment, we employ the same methodology as the circuit court and our review is de novo. *See* ***Kara B. v. Dane County***, 198 Wis.2d 24, 33, 542 N.W.2d 777, 781 (Ct. App. 1995). A grant of summary judgment is appropriate in cases where there is no genuine issue of material fact and the moving party has established an entitlement to judgment as a matter of law. *See* ***id***. at 33, 542 N.W.2d at 781-82. Thus, "summary judgment is an appropriate remedy only in cases where no factual disputes—or disputed inferences from undisputed facts—exist; it is not a short cut to avoid a trial and the procedure does not lend itself to factually complex cases." ***Id.*** at 49, 542 N.W.2d at 788. It is improper to grant summary judgment when material is presented which is subject to conflicting interpretations or reasonable people might differ as to its significance. *See* ***id***.

We begin by concluding that no material issue of fact exists as to whether Regal Ware's 1994 letter terminated any and all agreements with TSCO. It is clear that it did. The letter unambiguously states that "[a]s of December 31, 1994, we will no longer work together in any way." Because none of the prior agreements between TSCO and Regal Ware contained termination dates, the agreements were terminable at will. However, when the agreement involves an exclusive distributorship, it may only be terminated with reasonable notice. *See* ***California Wine Ass'n v. Wisconsin Liquor Co.***, 20 Wis.2d 110, 125, 121 N.W.2d 308, 316 (1963). Here, the parties dispute whether reasonable notice was required and given in this case. Therefore, the summary judgment issue is narrowed to whether Regal Ware provided reasonable notice terminating its relations with TSCO. We conclude that a material issue of fact exists on this issue.

Regal Ware provided TSCO with a forty-five-day notice of termination. However, Regal Ware contends that it was not obligated to give *any* notice because TSCO was no longer in a distributorship relationship with Regal Ware. Regal Ware argues that its 1990 commission agreement superseded all other agreements with TSCO, including its distributor agreements. Because TSCO had no obligations under the 1990 agreement, Regal Ware argues that it was not required to give reasonable notice prior to termination. Although the circuit court ruled for Regal Ware, the court concluded that TSCO had demonstrated sufficient consideration to obligate Regal Ware to provide reasonable notice. The court then determined that the forty-five-day notice provided by Regal Ware was reasonable given the relationship between Regal Ware and TSCO.

TSCO contends that the circuit court improperly granted summary judgment because material issues of fact exist as to the effect of the October 1, 1990 agreement and whether it supplanted all prior agreements. TSCO argues that the 1990 agreement was intended to address only the commission agreements, not any other existing agreements between the parties. In support, TSCO submitted its prior agreements with Regal Ware and an affidavit from Henry Walls of TSCO.[1]

The prior agreements include a 1983 agreement between TSCO and Coronet for TSCO to distribute Coronet products to four Japanese companies. Subsequent agreements that alter the 1983 distributor agreement lay out commission structures based on Regal Ware's relationship with TSCO's Japanese distributors and provide overages or "rebates" for TSCO. As to the 1990 agreement, Walls' affidavit states:

> While the October 1, 1990 Streamlined Consent Agreement indicates that it "supersedes all previous agreements made on commission structures" and eliminates the 2% commission on sales that TSCO previously received, the agreement did not eliminate TSCO's add-on distributor fee or overage for TSCO's consent to use of its distributors as required by the 1983 Coronet Agreement. Instead, the October 1, 1990 agreement merely simplified the method of payment by calling for a flat 6% fee on all sets sold.

Walls' affidavit recited further actions TSCO had taken in reliance on its contractual relationship with Regal Ware. These included an expenditure of over $1 million under the 1990 and predecessor agreements, the design of specialized equipment for the Japanese distributors at a cost of over $100,000, the payment of

[1] We note that on a motion to reconsider filed with the circuit court, TSCO introduced an additional affidavit from Henry Walls and an affidavit from Inder Mehta, Regal Ware's former international sales director. The circuit court granted Regal Ware's motion to strike the affidavits on the basis that they should have been presented prior to the court's grant of summary judgment. Regal Ware contends, and TSCO does not dispute, that these additional affidavits should not be considered on appeal. We therefore do not rely on these affidavits in arriving at our decision.

distributor rebates in the approximate amount of $400,000, the entrance into a partnership with K&K Corporation and the investment of over $100,000 in the venture, and the sourcing out of new products and shared new technology with Regal Ware, Suzuki and K&K Corporation.

On summary judgment motion, we look at the affidavits and draw inferences from the facts contained therein, viewed in the light most favorable to the nonmoving party. *See* ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis.2d 555, 567, 278 N.W.2d 857, 862 (1979). If these facts are subject to conflicting interpretations or reasonable persons might differ as to their significance, summary judgment is improper. *See* ***id***. Here, we cannot say as a matter of law that the forty-five-days notice supplied to TSCO by Regal Ware was reasonable. Instead, the summary judgment evidence raises a genuine and material issue of fact on this question. This is especially so in light of the complexity of the parties' historical dealings, the competing evidence and inferences supplied by each party, and our obligation to review the evidence and the inferences in a light most favorable to TSCO. *See* ***id***.

In ***California Wine***, our supreme court noted the complexity of the business relationship between the parties and the conflicting evidence as to what would be reasonable notice. ***California Wine,*** 20 Wis.2d at 126-27, 121 N.W.2d at 317. The court upheld the circuit court's determination that a sixty-day notice was reasonable. *See* ***id***. at 127, 121 N.W.2d at 317. However, the supreme court noted that the circuit court's ruling was made only after "hearing all the testimony regarding this question and examining the record." ***Id.*** Summary judgment does not usually lend itself to factually complex cases. *See* ***Kara B.***, 198 Wis.2d at 49, 542 N.W.2d at 788. We hold that the reasonableness of Regal Ware's termination notice is a matter to be decided after a full trial.

CONCLUSION

We conclude that the circuit court properly denied TSCO's motion for a stay pending the proceedings in Pennsylvania based on its finding that TSCO failed to demonstrate that substantial justice required the action to be tried in a different forum. We therefore uphold the circuit court's order denying TSCO's request for a stay.

However, we reverse the circuit court's grant of summary judgment to Regal Ware. While Regal Ware was entitled to terminate its contract with TSCO, it was obligated to provide reasonable advance notice of that action. A material issue of fact exists as to the reasonableness of the forty-five-days notice provided by Regal Ware. We reverse the circuit court's order granting summary judgment in favor of Regal Ware. We remand for further proceedings.[2]

By the Court.—Order affirmed, judgment reversed and cause remanded.

Not recommended for publication in the official reports.

[2] Regal Ware has filed a motion to strike a portion of TSCO's reply brief that argues the effect of Pennsylvania law on the parties' agreement. However, our decision does not rely on this argument or this law asserted by TSCO. Regal Ware's motion is moot in light of our holding.