**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 31, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-1811**

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

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**KARL C. WILLIAMS AND THOMAS R. WARD,**

**PLAINTIFFS-APPELLANTS-**
**CROSS-RESPONDENTS,**

**v.**

**NORTHERN TECHNICAL SERVICES, INC.,**
**A WISCONSIN CORPORATION,**

**DEFENDANT-RESPONDENT-**
**CROSS-APPELLANT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Judgment was entered against Northern Technical Services, Inc. (NTS) on promissory notes it gave to repurchase shares of stock held by Karl C. Williams and Thomas R. Ward (collectively, Williams) after they

terminated their employment with NTS. Williams and Ward appeal from the judgment because the trial court did not award them their expenses and attorney's fees incurred in this action. NTS cross-appeals from the trial court's determination that the noncompete provision subjugating Williams and Ward was unreasonable, unenforceable, and not breached by Williams and Ward. We affirm the judgment.

¶2 NTS is a personnel agency specializing in the recruitment and placement of technically skilled employees. Williams and Ward were both long-term key employees with NTS and had signed shareholder and employment agreements. The agreement contained a noncompete provision prohibiting them from "directly or indirectly, as an employee, owner, partner, agent or otherwise, participat[ing] in any manner, assist[ing] or advis[ing] any person, firm or corporation engaged in any competing business" for a period of six months after termination of employment and "within a 50-mile radius of either the County of Milwaukee, Wisconsin, or any other county in which [NTS] shall maintain an office." The provision also prohibited them for that six-month period from soliciting or accepting any business with a competing business from "any customer or client to which [NTS] … had sent an invoice at anytime within a 90-day period immediately prior to the effective date of the … termination of employment." In the event of a breach of the covenant not to compete, NTS was entitled to cancel the balance due on the repurchase of stock.

¶3 Williams and Ward terminated their employment with NTS on March 18, 1994. In accordance with the terms of the shareholder agreement, arrangements were made for repurchase of their stock. Each took a promissory note as partial payment for stock. In April 1994, Williams and Ward became shareholders in a newly incorporated business, The Waterstone Group, Inc., which

would become a competitor of NTS. In August 1994, NTS cancelled the balance remaining on the promissory notes on the ground that Williams and Ward, through Waterstone Group, had engaged in competing activities.

¶4 This suit followed and NTS denied liability on the promissory notes because of the breach of the noncompete provision. Finding that the noncompete provision was void, the trial court granted summary judgment. On appeal the judgment was reversed because the question of the reasonableness of the noncompete provision was not appropriate for summary judgment. *See* ***Williams v. Northern Technical Servs., Inc.***, No. 95-2809, unpublished slip op. at 3 (Wis. Ct. App. Apr. 30), *review denied*, 211 Wis. 2d 530, 568 N.W.2d 298 (Wis. July 25, 1997). On remand, the matter was tried to the court. The trial court concluded that the broad prohibition of activities by the noncompete provision was not reasonably necessary for the protection of NTS and that the noncompete provision was not breached by Williams's preparatory activities. Judgment was entered for the balance due on the promissory notes.

¶5 We first address NTS's argument that the trial court erred in concluding that the noncompete provision is overbroad. ***Geocaris v. Surgical Consultants, Ltd.***, 100 Wis. 2d 387, 302 N.W.2d 76 (Ct. App. 1981), controls on this point. Following his termination of employment with Surgical Consultants, Geocaris was prohibited from practicing as a physician in the same county for nine months. *See* ***id.*** at 388. Adhering to the principle that a restrictive covenant may not impose a greater restraint than reasonably necessary for the employer's protection, the court held that the restriction of Geocaris's activities beyond performing surgery was not reasonably necessary. *See* ***id.*** at 389. The prohibition against the practice of any type of medicine was overbroad and the covenant was unenforceable. *See* ***id.***

¶6 The trial court found that the recruitment and placement of technically skilled employees is a specialized field of the larger staffing industry that includes many other types of employees such as clerical, professional or blue collar employees. NTS is engaged only in the specialized field, like Surgical Consultants in ***Geocaris***. Yet the restriction against Williams was not limited to the specialized field dealing only with technically skilled employees. Like the provision in ***Geocaris***, the noncompete provision is overbroad in prohibiting Williams from engaging in all fields of employee staffing and in positions not equivalent to that held at NTS. Noncompete provisions are viewed with disfavor and strictly scrutinized. *See* ***Wausau Med. Ctr., S.C. v. Asplund***, 182 Wis. 2d 274, 281, 514 N.W.2d 34 (Ct. App. 1994). Applying that lens, the provision here is not reasonably necessary to NTS's protection and is unenforceable.

¶7 Having concluded that the noncompete provision is unreasonable, we need not consider the trial court's alternative ground that Williams did not engage in competitive activities. We turn to Williams's appeal.

¶8 The security agreement to Williams provides that upon NTS's default in payment, Williams could take possession of certain collateral which included equipment, fixtures, general intangibles, and accounts. Williams was entitled to be reimbursed for any expenses incurred in "protecting or enforcing [their] rights under [the security agreement] before and after judgment including, without limitation, reasonable attorneys' fees and legal expenses and all expenses of taking possession, holding, preparing for disposition and disposing of the collateral." Williams seeks to recover the entire cost of this more than five-year-old litigation.

¶9 Language similar to that used here was at issue in ***Kohlenberg v. American Plumbing Supply Co.***, 82 Wis. 2d 384, 263 N.W.2d 496 (1978). There the court rejected the notion that the terms of the security agreement permitted recovery of attorney fees incurred in an action to enforce the terms of the promissory note. *See* ***id.*** at 400. It held that the security agreement "clearly relates to the expenses, including attorney's fees, of liquidating the collateral, i.e., exercising the rights arising from the terms of the security agreement." ***Id.***

¶10 Here, the action was to enforce payment on the promissory notes. At no time did Williams execute a remedy under the security agreement by taking possession or disposing of any collateral. In fact, the trial court enjoined Williams from taking action under the security agreement. Security for payment under the notes was never in question because NTS paid into court the entire sum due under the notes. This brings this case within the holding of ***Kohlenberg***. That the security agreement provides for recovery of expenses incurred before judgment does not encompass expenses unrelated to dealing with the collateral.

¶11 No costs to any party.

*By the Court.*—Judgment affirmed.

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