COURT OF APPEALS DECISION DATED AND FILED

May 3, 2005

Cornelia G. Clark
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. 2004AP1942

Cir. Ct. No. 199CV514

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

FOREMOST INDUSTRIAL EXCHANGE AND MARED INDUSTRIES, INC., D/B/A FOREMOST INDUSTRIAL EXCHANGE,

PLAINTIFFS-RESPONDENTS,

V.

SCOTT APPLIN, RICKIE GRIFFIN, NICHOLAS HERBURGER AND BRIAN THEILER,

DEFENDANTS,

SCOTT OBST,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Scott Obst appeals from an order dismissing, for lack of prosecution, his motion to reopen and vacate an earlier judgment in favor of Mared Industries, Inc., d/b/a Foremost Industrial Exchange. *See* WIS. STAT. RULE 805.03.[1] We affirm.

I.

¶2 In the early 1990s, Obst worked in sales for Mared. Mared used telemarketing to sell industrial cutting tools, abrasives, and diamond blades. A division of Mared also sold adult videos. Obst and several others in sales left Mared, and, in April of 1992, Mared sued Obst and the others, claiming that they stole trade secrets, including confidential customer information. On October 5, 1992, after Mared repeatedly tried unsuccessfully to get discovery responses from the defendants in that action, the trial court entered a default judgment against Obst and the others for $2,377,140.90. Over the next two years, Mared was able to collect a little more than $200,000 on the judgment.

[1] WISCONSIN STAT. RULE 805.03 provides:

> For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of the court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a) [sanctions for failure to comply with discovery order]. Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07 [relief from judgment or order]. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

¶3 Mared rehired Obst in 1996. On October 10, 1996, Mared and Obst signed a "settlement and compromise agreement." (Uppercasing omitted.) The agreement provided that Mared would release Obst from the 1992 judgment in return for Obst's promise not to defraud Mared. Obst also agreed both not to compete with Mared for eighteen months after he left Mared's employ and not to contact anyone who had been a Mared customer during the twelve-month period before he left Mared. The settlement agreement also had an automatic-enforcement clause: "In the event of [Obst]'s breach of any provision of this Agreement, MARED will be entitled to vacate the release of [Obst] from the JUDGMENT and to re-enter the JUDGMENT against [Obst], without notice to [Obst]." (Uppercasing in original.) On October 22, 1996, consistent with its settlement agreement with Obst, Mared filed a "release of judgment" with the Milwaukee County Circuit Court, releasing Obst from the 1992 judgment. (Uppercasing omitted.)

¶4 On January 1, 1998, more than one year after Mared filed the "release of judgment," Obst entered into a written employment agreement with a Mared subsidiary. This January 1998 employment agreement also had a covenant not to compete. Additionally, it had an integration clause: "This Agreement sets forth the entire agreement between the parties with regard to the subject matter hereof." On January 1, 2000, Mared and Obst amended in writing the 1998 employment agreement. The amended agreement also had covenant-not-to-compete and integration clauses.

¶5 Obst left Mared in February of 2003. He moved to Nevada, and formed Seam Consulting, Inc., and Ballistic Video, Inc. On July 18, 2003, Mared filed a petition in Milwaukee County to reopen and reinstate the 1992 judgment, claiming that Obst violated the covenant-not-to-compete clause in the 1996

settlement agreement by: (1) operating competing companies; (2) employing former Mared employees; and (3) using Mared's confidential trade secrets. The trial court entered judgment reinstating the 1992 judgment on July 22, 2003.

¶6 On September 19, 2003, Obst moved to reopen and vacate the 2003 reinstatement of the 1992 judgment. In an affidavit attached to his motion, Obst denied that he had violated the settlement agreement. Obst also challenged the validity of the settlement agreement, claiming, *inter alia*, that: (1) the settlement agreement did not authorize the trial court to reinstate the 1992 judgment; (2) the settlement agreement was superseded by the subsequent employment contracts; and (3) the covenant not to compete in the settlement agreement was invalid under California law, which was designated by Obst's employment agreements with Mared as the state whose law would apply to those agreements. The settlement agreement, which, as we have seen, antedated the employment agreements, did not have a choice-of-law provision, and the employment agreements did not purport to impose California law on that settlement agreement.

¶7 On September 24, 2003, Obst sought to stay the enforcement of the reinstated 1992 judgment pending an expedited hearing on his motion to reopen and vacate the 2003 judgment. The trial court granted the stay on September 29, 2003, and also ordered expedited discovery.

¶8 On October 31, 2003, Mared asked the trial court to impose sanctions against Obst, claiming that Obst did not comply with its discovery requests. On November 24, 2003, the trial court held a hearing on Mared's motion for sanctions. At the hearing, the trial court orally denied Obst's legal challenges to the settlement agreement's validity, and determined that the only issue requiring a hearing was whether Obst violated that agreement. The trial court memorialized

these rulings in an order dated December 19, 2003, and also ordered Obst to give Mared the requested discovery materials. The order scheduled an evidentiary hearing for May 14, 2004, on Obst's motion to vacate the reinstatement of the 1992 judgment, and directed Obst to identify any witnesses he intended to call at that hearing and to give Mared a written summary of their expected testimony.

¶9 Obst appealed the December 19, 2003, order in January of 2004, and asked the trial court for a stay pending appeal. In the meantime, Mared filed with the trial court a motion seeking sanctions against Obst or, in the alternative, to compel discovery, claiming that Obst was still not fulfilling its discovery obligations. The trial court held a hearing on February 16, 2004, and denied Obst's motion for a stay. The trial court also sanctioned Obst for failing to comply with the discovery deadlines. The trial court memorialized these rulings in an order dated March 2, 2004, and again ordered Obst to turn over to Mared any discovery material.

¶10 On February 23, 2004, Obst moved to withdraw his request for an evidentiary hearing on his motion to reopen and vacate the July 22, 2003, judgment. On April 1, 2004, the trial court held a hearing on that motion to withdraw. At that April hearing, Obst's lawyer told the trial court that Obst was withdrawing his request because Obst "cannot afford to proceed with the trial. It's a matter of cost, and he doesn't have the wherewithal to prepare for a trial, do the discovery." Obst's lawyer also told the trial court that Obst was not requesting any action from the trial court at that time.

¶11 On April 23, 2004, we dismissed Obst's appeal from the December 19, 2003, order because it was not final. *See* ***Foremost Indus. Exch. v. Applin***, No. 2004AP0194, unpublished slip op. (WI App Apr. 23, 2004). The trial court

entered a final order on June 4, 2004, reaffirming the December 19, 2003, order, and dismissing Obst's motion to reopen and vacate the July 22, 2003, judgment. Although the trial court crossed out "for Failure to Prosecute" from the order it signed on June 4, 2004, it is clear from both Obst's refusal to go ahead with the evidentiary hearing on whether he had breached the 1996 settlement agreement, and the trial court's oral rulings, that this was the reason for the dismissal. Simply put, based on the trial court's preliminary rulings on the validity of the settlement agreement, the only issue to be tried was Obst's contention that he had not breached that agreement. When Obst refused to proceed with that hearing (after refusing to provide the discovery materials that the trial court deemed material to the facts to be tried at that hearing), the trial court dismissed his motion for relief from the judgment that was reinstated as a result of that alleged breach.

II.

¶12 Although Obst's appellate briefs challenge the validity of the October 1996 settlement agreement, the dispositive issue on appeal is whether the trial court erroneously exercised its discretion in dismissing Obst's motion for lack of prosecution. *See* ***Monson v. Madison Family Inst.***, 162 Wis. 2d 212, 224, 470 N.W.2d 853, 858 (1991) (decision to dismiss for lack of prosecution is within the trial court's discretion). Thus, Mared's brief on appeal asserts:

> Mr. Obst's failure to accept the trial court's offer [to conduct an evidentiary hearing], refusal to honor any discovery, refusal to honor any trial court orders, and resultant dismissal of this action for failure to prosecute precludes Mr. Obst from claiming that this court should engage in an independent investigation of the nature, extent, and impact of any "employment restrictions" found in the Settlement and Compromise Agreement.

We agree. Obst has neither responded to Mared's argument nor briefed the lack-of-prosecution issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (matter not refuted deemed admitted). Significantly, he has not even attempted to show that the trial court erroneously exercised its discretion. *See* ***Monson***, 162 Wis. 2d at 224, 470 N.W.2d at 858 (burden on appellant to show erroneous exercise of discretion when trial court dismisses for failure to prosecute). This is fatal to his appeal. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed or argued on appeal are waived). Accordingly, we do not discuss the other issues Obst raises. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

By the Court.—Order affirmed.

Publication in the official reports is not recommended.