COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1743 **Cir. Ct. No. 2002CV8729**

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

DIAMONDBACK FUNDING, LLC,

PLAINTIFF-APPELLANT,

V.

CHILI'S OF WISCONSIN, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Reversed and cause remanded*.

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Diamondback Funding, LLC (Diamondback) appeals the order dismissing its request for injunctive relief. This case involves a restrictive covenant, pursuant to which Diamondback sought to prevent Chili's of Wisconsin, Inc. (Chili's) from building a restaurant on land located adjacent to

land on which a restaurant owned by Diamondback operated. The trial court originally denied Diamondback's request for an injunction and granted summary judgment to Chili's, but this court reversed. Upon remand, the trial court agreed with Chili's that for Diamondback to prove irreparable harm, which is necessary to obtain an injunction, it would have to produce certain financial records. The trial court ultimately dismissed the matter when Diamondback refused to produce the records.

¶2 Diamondback contends that the trial court erred in concluding that to obtain an injunction it was necessary for Diamondback to prove irreparable harm, specifically, through financial harm. We are satisfied that proof of irreparable financial harm is not required for Diamondback to show irreparable harm, and that the trial court must instead balance the equities to determine whether Diamondback is able to demonstrate that it was irreparably harmed by Chili's. Accordingly, we reverse the trial court's dismissal of Diamondback's claim, and remand for a hearing on remedies, to determine, through a balancing of the equities, whether Diamondback is able to show that it has sustained irreparable harm and is thus entitled to an injunction to enforce the restrictive covenant.

I. BACKGROUND.

¶3 Diamondback is the owner of Tumbleweed Southwest Mesquite Grill and Bar (Tumbleweed), including a restaurant located in Franklin, Wisconsin. On July 14, 1999, Diamondback purchased the land (parcel 1) from Home Depot, on which it subsequently built the Franklin Tumbleweed. Under the Purchase and Sale Agreement, Home Depot agreed to the following deed restriction for the adjacent lot (parcel 2):

> Seller agrees to deed restrict the adjoining outlot (the "Outlot") to prohibit the operation of any casualty [sic], theme-type restaurants specializing in Mexican food. Seller will also deed restrict the Outlot against the operation of any of the following steakhouses thereon: Outback Steakhouse, Lonestar Steakhouse, Longhorn Steakhouse, Steak and Ale, and Damon's Ribs.…

¶4 On April 5, 2000, Home Depot sold parcel 2 to Rose Properties, LLC. Home Depot and Rose Properties also entered into a Restrictive Covenant Agreement (restrictive covenant) which included the following language:

> No portion of the Rose Property [i.e. parcel 2] may be leased, used or occupied as or for a funeral parlor; flea market; discotheque; skating rink; Mexican restaurant, steakhouse restaurant, or any other restaurant (except for (i) an Old Country Buffet, or (ii) a fast food restaurant, provided such fast food restaurant does not serve primarily Mexican food)….

(Alteration added.) The agreement further provides that the restrictive covenant "shall run with the land and be binding upon Rose and each of Rose's tenants, subtenants and other occupants, and its and their respective successors and assigns."

¶5 Subsequently, Brikler International, Inc., the parent corporation of Chili's, offered to purchase part of parcel 2 from Rose Properties. On May 7, 2002, Home Depot and Rose Properties executed Amendment No. 1 to Restrictive Covenant Agreement (amendment), modifying the language of the restrictive covenant by deleting the language "Mexican restaurant, steakhouse restaurant or any other restaurant (except for (i) an Old Country Buffet, or (ii) a fast food restaurant, provided such fast food restaurant does not serve primarily Mexican food)," and replacing it with "or any casual, theme-type restaurant specializing in Mexican food...." The amendment specifically stated that its purpose was to "clarify that the establishment and operation of a Chili's Grill & Bar is a permitted

use of" parcel 2. Diamondback was not informed of the amendment. On July 6, 2002, Rose Properties sold part of parcel 2 to Chili's. Construction of the Chili's restaurant on parcel 2 began in 2002.

¶6 On September 6, 2002, Diamondback filed a complaint against Chili's, alleging that the construction of the Chili's restaurant violated the restrictive covenant and requested a temporary restraining order, temporary injunction and permanent injunction prohibiting Chili's from constructing and operating a Chili's restaurant on parcel 2. On November 14, 2002, the trial court denied Diamondback's request for an injunction on grounds that Diamondback had not shown that a Chili's restaurant was a restaurant "specializing in Mexican food," and subsequently granted summary judgment to Chili's on the grounds that the language "specializing in Mexican food" was vague and unenforceable. Diamondback appealed to this court.

¶7 On July 27, 2004, this court issued a decision reversing the summary judgment. *See* ***Diamondback Funding, LLC v. Chili's of Wis., Inc. (Diamondback I)***, 2004 WI App 161, 276 Wis. 2d 81, 687 N.W.2d 89. We concluded that because Diamondback was a third-party beneficiary of the Home Depot/Rose Properties restrictive covenant, and since contract provisions designed to benefit a third party may not be rescinded or modified without the third party's consent and Diamondback did not consent to the modification, it followed that "the May 2002 modification could not and did not dilute Diamondback's rights in the restrictive covenant in the April 2000 Chili's/Rose contract." ***Id.***, ¶¶8-9. Accordingly, we held that the May 2002 modification was a "nullity." ***Id.***, ¶9.

¶8 We also determined that neither the 1999 restrictive covenant nor the 2000 restrictive covenant was ambiguous. ***Id.***, ¶15. We then explained that the

case could not be resolved on summary judgment because the parties disputed whether Chili's is a "Mexican restaurant," a restaurant that serves "primarily Mexican food," or is a restaurant "specializing in Mexican food," and each side had submitted a plethora of conflicting material. ***Id.***, ¶19. We then explained:

> In order to get an injunction, Diamondback must show that Chili's will injuriously violate Diamondback's rights by maintaining a restaurant on the lot that either serves "primarily Mexican food," or is a restaurant "specializing in Mexican food," or is a "Mexican restaurant," and, also, that its "injury is irreparable, *i.e.*, not adequately compensable in damages."

Id.

¶9 Upon remand, Diamondback moved for partial summary judgment, requesting a finding that the restrictive covenant at issue is the one dated April 5, 2000, and asserting that Chili's had violated that restrictive covenant. Chili's filed a cross-motion for summary judgment, arguing that: Diamondback did not have standing to enforce the restrictive covenant as expressed in the 2000 version, since Diamondback did not bargain for it; and "Diamondback has not suffered any injury as a result of Chili's operating next door." Diamondback filed a response, asserting that it is entitled to enforce the 2000 restrictive covenant through injunctive relief, and, as an alternate remedy, may be entitled to damages. Diamondback filed under seal an affidavit by its Chief Financial Officer, John Opolka, and maintained, based on the affidavit, that its "profits for 2002-2004 never reached the 2001 (pre-Chili's levels)"; that "sales has [sic] never reached [the] 2001 level"; and that it has "had to lower its forecasts and … has definitely been damaged." Chili's responded that Diamondback has not shown that there is an issue of fact because its own records, specifically Opolka's affidavit, fail to show lost profits at the Franklin Tumbleweed, and Diamondback cannot show lost

profits without comparing it to its other Wisconsin restaurants, which Diamondback has refused to do.

¶10 During discovery, Chili's made a document request for the production of financial statements and financial reports for all Wisconsin Tumbleweed restaurants from 1998 to the present. Diamondback did not produce the documents on grounds that it considered them irrelevant and felt the request was "for purposes other than discovery of admissible evidence." Upon remand, Chili's again made the same request. Diamondback did not produce the documents.

¶11 On July 18, 2005, the trial court conducted a hearing on the summary judgment motions. The court rejected Chili's contention that Diamondback lacked standing to request enforcement of the 2000 restrictive covenant, and concluded that this court's decision should be read as "referring to language in both the 2000 and the 1999 covenants." The court therefore held that Diamondback was entitled to summary judgment because under the 2000 covenant, Chili's did not satisfy either of the exceptions to the prohibition against a restaurant occupying parcel 2—that it be an "Old Country Buffet" or a "fast food restaurant"—and Chili's thus violated the restrictive covenant as a matter of law. As a result, the court ordered that the case proceed to trial on the remedy for the violation of the restrictive covenant, noting that Diamondback would have to prove irreparable harm.

¶12 Chili's asserted that Diamondback should turn over the documents containing the financial information about the various Tumbleweed restaurants in Wisconsin, apparently relied on by Opolka, and maintained that Diamondback could not prove injury without that information. Diamondback disagreed, and

explained that it intended to call witnesses, including Opolka, to show irreparable harm. The court agreed with Chili's that the financial information of other Wisconsin Tumbleweed restaurants was necessary for Chili's to be able to cross-examine Diamondback's witnesses, and concluded that Chili's had a right to it. The court asked the parties whether an order to compel production of the documents was needed, and both responded that one was not necessary. Diamondback promised to produce the information "in less than two weeks." On this basis, the court denied Chili's summary judgment motion. Diamondback did not turn over the documents to Chili's.[1]

¶13 On June 6, 2006, the trial court, without holding a hearing, issued a written order dismissing the case on the merits with prejudice. The dismissal order reads:

> The court, having determined that in order for Diamondback Funding, LLC ("Diamondback") to prevail in establishing its right to relief, it need produce financial records of its other Wisconsin Tumbleweed restaurants to the defendant, Chili's of Wisconsin, Inc. ("Chili's"), and Diamondback, having refused to do so.
>
> IT IS HEREBY ORDERED that the … matter be dismissed....

Diamondback now appeals from this order.

[1] The docket entries reflect that on November 21, 2005, the trial court entered a final order of dismissal. The entry reads "Dismissed by the court," and "Parties having failed to file a proposed order Court ordered action dismissed." There is no other reference to this November 21, 2005 order in the record. On October 31, 2006, following the trial court's subsequent filing of a written order on June 6, 2006, Chili's filed a motion with this court to supplement the record, referencing the November 21, 2005 action. The motion was denied.

II. ANALYSIS.

¶14 We review a circuit court's decision to impose sanctions under an erroneous exercise of discretion standard. ***Schultz v. Sykes***, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. We uphold a court's discretionary decision if it has examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). "Although dismissing an action with prejudice is within a circuit court's discretion, it is a particularly harsh sanction," and "[i]t is therefore appropriate only in limited circumstances." ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶42, __ Wis. 2d __, 726 N.W.2d 898. Underlying the court's discretionary decision are questions of fact and issues of law. *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 153, 502 N.W.2d 918 (Ct. App. 1993). We independently determine any underlying questions of law. *See* ***Oliveto v. Circuit Court for Crawford County***, 194 Wis. 2d 418, 429, 533 N.W.2d 819 (1995).

¶15 When seeking an injunction, a plaintiff must show a sufficient likelihood that the defendant's future conduct will cause the plaintiff irreparable harm. ***Pure Milk Prods. Co-op. v. National Farmers Org.***, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Irreparable harm is that which is not adequately compensable in damages. ***Id.*** The plaintiff must also lack an adequate remedy at law, ***Sunnyside Feed Co. v. City of Portage***, 222 Wis. 2d 461, 472, 588 N.W.2d 278 (Ct. App. 1998), and establish that "on balance, equity favors issuing the injunction," ***Nettesheim v. S.G. New Age Prods., Inc.***, 2005 WI App 169, ¶21, 285 Wis. 2d 663, 702 N.W.2d 449. The requirements are essentially the same for both temporary and permanent injunctions. ***Werner v. A. L. Grootemaat & Sons, Inc.***, 80 Wis. 2d 513, 520-21, 259 N.W.2d 310 (1977) (temporary injunctions are

issued only when necessary to preserve the status quo and irreparable injury is satisfied by a showing that without it to preserve the status quo the permanent injunction sought would be futile); *see* ***Gillen v. City of Neenah***, 219 Wis. 2d 806, 821, 580 N.W.2d 628 (1998) (permanent injunctions are designed to prevent injury, are issued upon proof of a sufficient threat of future irreparable injury, and it is not necessary to wait until injury has been done).

¶16 Whether to grant an injunction is left to the trial court's discretion. ***Bubolz v. Dane County***, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990). "A discretionary determination will be sustained where it is demonstrably made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." ***State v. Seigel***, 163 Wis. 2d 871, 889, 472 N.W.2d 584 (Ct. App. 1991).

¶17 Diamondback contends that the trial court erred in concluding that it could not demonstrate irreparable harm unless it produced financial records of other Wisconsin Tumbleweed restaurants, and thus erred in dismissing the action on account of its failure to produce the records.[2] It submits that in arguing that it must produce evidence that Tumbleweed restaurants located close to a Chili's restaurant have reduced sales compared to those restaurants that are not located close to a Chili's, Chili's confuses irreparable harm with damages. Diamondback explains that "sales or profits at other locations is not the 'only' evidence that

[2] Diamondback stresses that the relief it is, and has been, seeking is a permanent injunction, not damages for lost profits, and that in the process of seeking a permanent injunction, it first pursued a temporary injunction to prevent the construction of a Chili's restaurant. It explains that because Chili's nevertheless chose to construct and operate its restaurant, it was unable to prevent the harm it had hoped to prevent with a temporary injunction, but emphasizes that it seeks to enforce the restrictive covenant though a permanent injunction.

would be probative of injury" because "Chili's very existence is 'evidence' of irreparable harm," and "[a]rguably, any dollar made by Chili's in violation of a valid, enforceable restrictive covenant is injurious to Diamondback's property rights." Diamondback then cites case law from other jurisdictions and the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 8.3 for the proposition that a restrictive covenant will be enforced even in the absence of showing irreparable harm.

¶18 Stressing that an injunction is an equitable remedy, Diamondback submits that by requesting the financial data, Chili's erroneously seeks to "quantify" the irreparable harm, even though irreparable harm is defined as that which cannot be quantified. It also maintains that it would be inequitable to compel it to quantify the harm, since the irreparable harm may not yet be realized, and that Chili's thus focuses on the past while ignoring the future, threatened and ongoing injury. Diamondback concludes that making a profit does not preclude enforcement of a restrictive covenant, since profit is the very reason it went into business and sought to enforce a restrictive covenant.

¶19 Chili's responds that Diamondback mischaracterizes the issue as a question of law, when in reality the trial court dismissed the case because Diamondback refused to produce financial records, and the dismissal was only a discretionary sanction for a discovery violation under WIS. STAT. § 804.12(2)(a) (2005-06).[3] According to Chili's, "Diamondback elected to withhold documents

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

in defiance of the Court's order instead of proceeding to trial on its claim of an injunction and damages."

¶20 Chili's also asserts that the trial court did not in fact require that the focus be on financial harm, but rather, the issue of finances was raised by Diamondback. Chili's insists that it was only after Diamondback raised the issue that Chili's then simply set forth the relevance of having the financial records of restaurants with and without a Chili's restaurants next door in order to demonstrate that the harm was not as significant as Diamondback contended, or that there was no harm. Chili's thus submits that the trial court was correct in its conclusion that the financial information was relevant, and that "[t]he circuit court was also correct to decide that Diamondback could not prevail if it did not *produce* the information" (emphasis in brief), and that, as a result, after Diamondback refused to comply, dismissal was proper.

¶21 In the alternative, Chili's also submits that Diamondback is not entitled to an injunction because it waived its right to an injunction when it failed to comply with the discovery "order" and accepted the resulting dismissal so it would not have to produce the documents. Finally, Chili's also submits that had the case proceeded to a hearing on remedies, Diamondback would still not be entitled to an injunction because the terms Diamondback seeks to enforce were not bargained for and were placed in the restrictive covenant by mistake. Citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 8.3, Chili's submits that the mistake makes enforcement unfair and, as a matter of equity, enforcement should be denied.

¶22 We begin by addressing the propriety of dismissal as a sanction. WISCONSIN STAT. § 804.12(2)(a)[4] provides that dismissal may be the sanction if a party fails to comply with a discovery order: "If a party ... fails to obey an order to provide or permit discovery, … [the court] may make such orders in regard to the failure as are just, … [including] dismissing the action."[5] In order to determine whether a sanction is "just," a party must first file a motion seeking to compel discovery. Consequently, a prerequisite for a court order sanctioning a party for a discovery violation is the filing of a motion to compel production. Here, the trial

[4] WISCONSIN STAT. § 804.12 provides in relevant part:

> **(1)** MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
>
> (a) *Motion.* If a deponent fails to answer a question …, or a corporation or other entity fails to make a designation …, or a party fails to answer an interrogatory …, or if a party, in response to a request for inspection …, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.…
>
> ….
>
> **(2)** FAILURE TO COMPLY WITH ORDER. (a) If a party … fails to obey an order to provide or permit discovery, … the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> ….
>
> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.…

[5] Additionally, WIS. STAT. § 804.12(2)(a) limits the sanctions a trial court may impose for failure to comply with court orders to those that are "just." ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶43, __ Wis. 2d __, 726 N.W.2d 898.

court never granted an order to compel production of the documents. The only order the trial court issued was the June 6, 2006 order which dismissed the case on the merits. At the hearing on July 18, 2005, the court merely asked the parties whether an order was necessary or whether the parties could work it out amongst themselves, to which the parties responded that they believed they could. Although the parties obviously did not resolve the issue, the fact remains that an order to compel production of the financial documents was never issued. The prerequisite of § 804.12 was therefore not met.

¶23 The trial court could have compelled Diamondback to produce financial records that would show comparisons between Tumbleweed restaurants located adjacent to Chili's restaurants and ones that were not located adjacent to Chili's restaurants—records apparently used by Opolka to form his opinion as to Diamondback's claim for dollar loss. However, because the trial court never issued an order to compel production, it could not use dismissal as a sanction for failure to follow the nonexistent order. Given that there was no order, Chili's is thus incorrect in referring to an "order" and claiming that "Diamondback elected to withhold documents in defiance of the Court's order." Therefore, because there was no order and no violation of that order, it also follows that Diamondback could not have waived, as Chili's claims, its right to seek an injunction by violating the nonexistent order.

¶24 Having determined that the dismissal cannot be sustained on the basis of it being a discretionary discovery sanction, we reach the heart of the case: whether the trial court properly determined that for Diamondback to be able to enforce the restrictive covenant through an injunction it would have to prove irreparable harm, specifically through financial harm.

¶25 Both Chili's and Diamondback acknowledge that an injunction is an equitable remedy. In determining whether to issue an injunction, the proper test in Wisconsin requires a balancing of equities to assess whether irreparable harm has been proven. *See* ***Nettesheim***, 285 Wis. 2d 663, ¶21. We therefore reject Diamondback's suggestion that we ought to apply the rule expressed in cases from other jurisdictions whereby an injunction is available as relief to enforce a restrictive covenant without any proof of irreparable harm.

¶26 We are satisfied that, in concluding that Diamondback would not be entitled to an injunction, the trial court did not apply the appropriate legal standard and principles of equity. *See* ***Seigel***, 163 Wis. 2d at 889. The trial court, as explained, concluded that for Diamondback to be able to show irreparable harm and thus be entitled to an injunction, it had to produce records that showed financial harm. In so reasoning, the trial court, and Chili's on appeal, appear to confuse irreparable harm with damages, and Chili's does not cite any authority supporting its assertion that Diamondback must demonstrate its injury through comparative financial data.

¶27 Economic loss is not the sole basis that can show irreparable harm justifying injunctive relief. Rather, as this court explained in ***Lake Bluff Housing Partners v. City of South Milwaukee***, 2001 WI App 150, 246 Wis. 2d 785, 632 N.W.2d 485, economic considerations are but one of many factors that must be weighed in assessing whether the equities favor granting an injunction. *See* ***id.***, ¶¶20-21. There must be an analysis as to whether continued future violations of the restrictive covenant would cause Diamondback irreparable harm, not merely an examination of past pecuniary loss. *See* ***Gillen***, 219 Wis. 2d at 821 (permanent injunctions are designed to prevent injury and may be issued upon proof of a sufficient threat of future irreparable injury). The fact that Diamondback is a

business and seeks to make a profit does not automatically preclude it from enforcing a restrictive covenant if it is unable or unwilling to show that it has suffered a financial loss as a result of the violation of the restrictive covenant. Thus, to conclude, as the trial court did, that it is possible to say, based on past financial data alone, whether a party is able to prove irreparable harm, is incorrect. Chili's statement that "[t]he circuit court was also correct to decide that Diamondback could not prevail if it did not *produce* the information" (emphasis in brief), is therefore also inaccurate.

¶28 Consequently, we reverse and remand for a hearing on remedies; that is, a determination of whether, after securing the restrictive covenant to prevent the operation of a restaurant like Chili's, Diamondback is able to demonstrate that it has sustained irreparable injury through Chili's operation, which, under Wisconsin law, requires a balancing of interests as discussed in ***Lake Bluff***. *See* ***id.***, 246 Wis. 2d 785, ¶27. At this stage, Diamondback will be given an opportunity to present evidence concerning irreparable harm; i.e., that the equities favor an injunction, and Chili's will be able to present its counter-arguments, as well as its contention that a mistake resulted in the insertion of the restrictive covenant in the deed.

¶29 THE RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 8.3(1) sets out the following factors for a trial court to consider when determining a remedy: "the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public."

¶30 Moreover, the fact that the restaurant has been built is of no consequence for assessing whether Diamondback is entitled to an injunction. *See*

Lake Bluff, 246 Wis. 2d 785, ¶¶20-21. If a building has been built, this is but one factor the trial court will consider in its exercise of discretion in fashioning a remedy, but it is not determinative, and a trial court has the discretion to issue an order to raze the building. *See* ***id.***

¶31 In sum, while the trial court could have denied Diamondback the right to use Opolka's testimony in seeking to prove financial loss on remand, and could have issued an order to compel discovery (and imposed sanctions following the failure to comply with that order), it could not dismiss the case outright, given that Diamondback had a right to prove—financial losses aside—that the court's failure to grant an injunction would cause it irreparable harm.

¶32 For the foregoing reason, we reverse the trial court's order dismissing the case and remand the matter to the trial court for a hearing.[6]

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[6] Diamondback also separately asks this court to vacate the order dismissing its case on grounds that the balance of equities favors granting a permanent injunction. As we have already explained, we are reversing the order and remanding the matter to the trial court for a determination of whether the balance of equities favors a permanent injunction, and we therefore do not discuss this aspect further here. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide non-dispositive issues).