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DISTRICT II

March 23, 2022

To:

Hon. William Domina
Circuit Court Judge
Electronic Notice

Matthew W. O'Neill
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County
Electronic Notice

Kendrick Yandell
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP1000

Blue Jay Communications, Inc. v. JSKI, Ltd.
(L.C. #2020CV506)

Before Neubauer, Grogan and Kornblum, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Blue Jay Communications, Inc. (“Blue Jay”) appeals from an order granting JSKI, Ltd.’s motion for summary judgment. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).¹ We further conclude that summary judgment was properly granted because there is no genuine issue of material fact as to damages and summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

JSKI provides cable splicing services. Starting in 2017, JSKI was an independent contractor for Blue Jay, providing splicing services for Blue Jay's projects in Wisconsin.

Blue Jay and JSKI continued their working arrangement, but in March 2019, signed a new agreement. This agreement was a one-year independent contractor agreement ("ICA"), which replaced their prior agreement. The ICA contained a non-solicitation provision,² which is at the heart of the dispute on appeal.

Blue Jay alleged, in its complaint, that it learned that JSKI breached the non-solicitation provision "by consulting with and/or providing services" to Blue Jay's competitors. Blue Jay additionally alleged that due to the breach, it "was forced to reallocate resources to ensure that its projects are completed in as timely a manner as possible, resulting in lost revenues, diminished productivity, and decreased profitability, as well as reputational damage due to delays."

² The non-solicitation provision reads as follows:

Non-Solicitation of Customers

10. During the term of this Agreement, and for a period of one year immediately following the termination of this Agreement, the Contractor shall not consult with or provide services to other persons (including corporations, firms and individuals), directly or indirectly, with respect to any services contracted with Blue Jay in the geographical area(s) services have been contracted, or provide services to customers, or their affiliates, for whom services contracted with Blue Jay have been rendered.

JSKI moved for summary judgment and set forth a number of arguments for why the court should grant such relief.³ One of JSKI's primary arguments was that Blue Jay could not prove damages, an essential element of its breach of contract claim.

The circuit court granted JSKI's motion, concluding that the non-solicitation provision was unenforceable. As to damages, the court found that "[s]omebody made a decision some place along the line here to not develop a record or not to pay to develop a record." The court concluded that Blue Jay's failure to adequately address damages was an additional reason to grant summary judgment. This appeal follows.

We independently review a grant of summary judgment, applying the same standards as the circuit court. *Forshee v. Neuschwander*, 2018 WI 62, ¶13, 381 Wis. 2d 757, 914 N.W.2d 643. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

In this case, we conclude that summary judgment is appropriate because there is no material factual dispute as to damages. Blue Jay has failed to prove that it suffered any damages.

³ JSKI argued summary judgment was warranted for the following reasons: (1) the non-solicitation provision was a restrictive covenant that was void under WIS. STAT. § 103.465; (2) the restrictive covenant failed under Wisconsin's common law "rule of reason"; (3) Blue Jay could not prove an essential element of its breach of contract claim because it did not suffer any damages from JSKI's splicing work for other cable installers; and (4) the restrictive covenant was too vague and indefinite to be enforceable.

A breach of contract claim requires proof of damages. *Brew City Redev. Grp., LLC v. Ferchill Grp.*, 2006 WI App 39, ¶11, 289 Wis. 2d 795, 714 N.W.2d 582 (breach of contract claim consists of three elements: (1) an enforceable contract; (2) a breach of that contract; and (3) damages). In order to survive summary judgment, Blue Jay had the burden of proof on all of the elements.⁴ *See Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993). Blue Jay needed to establish that a genuine issue of material fact exists on the element of damages by submitting evidentiary material “set[ting] forth specific facts.” *See* WIS. STAT. § 802.08(3).

Blue Jay contends that the affidavit of its president, John Houlihan, creates a genuine issue of material fact as to damages. Blue Jay directs us to Houlihan’s averment that “[a]s a result of JSKI’s breach, Blue Jay had to reallocate resources to ensure that projects were completed as timely as possible, resulting in lost revenues, diminished productivity, and decreased profitability, as well as reputational damages due to delays.” According to Blue Jay, this is sufficient to survive summary judgment because damages stemming from an alleged breach of a non-solicitation provision do not require mathematical certainty. *See Selmer Co. v. Rinn*, 2010 WI App 106, ¶30, 328 Wis. 2d 263, 789 N.W.2d 621 (“damages for breach of a noncompete clause do not require ‘mathematical certainty ... because such damages by their very nature cannot be definitely ascertained or determined’” (citations omitted)).

⁴ Blue Jay bears the burden of proof on all elements, including damages. *See generally* WIS JI—CIVIL 1700 (the “burden of proof rests upon each person claiming damages to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages ... and the amount of the damages”); WIS JI—CIVIL 3735 (The measure of damages for a breach of contract is the amount “which will compensate the plaintiff for the loss suffered because of the breach”).

While we agree that mathematical certainty is not required, the statute requires more than a bare bones assertion that damages can be proved. Blue Jay only offered a statement in an affidavit that parroted a vague allegation in its complaint. This vague description does not meet the standard for “evidentiary facts as would be admissible in evidence.” *See* WIS. STAT. § 802.08(3).

To avoid this outcome, Blue Jay asserts that it requested to see copies of JSKI’s tax returns and financial statements in order to assist it with the calculations of Blue Jay’s own damages, but JSKI objected to producing them. Blue Jay relays that while it “intended” to file a motion to compel the discovery, the motion “was delayed by JSKI’s filing for summary judgment.”

This argument is not persuasive as a reason to avoid summary judgment for three separate reasons. First, Blue Jay does not explain why JSKI’s tax returns and financial statements were necessary for Blue Jay’s calculations of its damages, which presumably would come from Blue Jay’s own financial data.

Second, even assuming that Blue Jay needed JSKI’s financial information to prove damages, its excuse for delay in getting that information falls short. Blue Jay argued that it intended to file a motion to compel responses to discovery. However, JSKI’s intervention in filing a motion for summary judgment somehow threw Blue Jay off track. Blue Jay could have moved to stay the summary judgment proceedings while it filed a motion to compel or it could have sought a continuance under WIS. STAT. § 802.08(4). Instead, Blue Jay did nothing.

Third, the motion for summary judgment was not a surprise attack on Blue Jay. JSKI points out that on separate occasions, Blue Jay told JSKI that it would provide an itemization of

its damages. Yet, Blue Jay never did so, even after JSKI made clear that it sought this information because it intended to seek summary judgment based on the lack of damages.

Beyond Houlihan's affidavit, the only evidence of damages that Blue Jay submitted in opposition to JSKI's motion for summary judgment was a series of unauthenticated e-mails. These e-mails, which were attached to the affidavit of Blue Jay's counsel, purported to show that Blue Jay tried to contact JSKI to perform projects but did not get a response because JSKI was performing other work in violation of the non-solicitation provision.

We do not consider those e-mails substantive evidence of damages. The e-mails themselves do not prove that Blue Jay suffered any damage. JSKI argued that the e-mails were unauthenticated, and could not be considered pursuant to WIS. STAT. § 802.08(3). *See id.* ("affidavits shall be made on personal knowledge ... set[ting] forth such evidentiary facts as would be admissible in evidence"). Blue Jay did not refute this allegation, nor did it authenticate the e-mails, and therefore, concedes the point. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (matter not refuted is deemed admitted).

Counsel's explanation for Blue Jay's failure to provide proof of damages at the summary judgment hearing was unpersuasive. Counsel stated, "depending on how today goes we will be filing a motion to compel as well as a motion to expand discovery so we can have a deposition" of JSKI's owner. In concluding that Blue Jay had failed to show any evidence of damages, the circuit court noted:

No deposition has been taken. Discovery cutoff was at the end of January[, which was months before the summary judgment hearing]. I hear today for the first time [a] complaint about what

information was not provided. I hear today for the first time that there will be a request to extend discovery. I hear today for the first time that there will be a request to depose witnesses. I note as [JSKI's counsel] did ... that this matter has been set on the court's trial calendar. I find that position we don't really have anything judge but it ain't our fault to be unacceptable.

We conclude that summary judgment was warranted based on the lack of a genuine issue of material fact as to damages. In light of this determination, we need not address Blue Jay's other arguments. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (we need not address all issues raised by the parties if one is dispositive).

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals