STATE OF MICHIGAN

COURT OF APPEALS

HURON TECHNOLOGY CORP., Plaintiff-Appellant,	UNPUBLISHED September 11, 2014
v	No. 316133 Alpena Circuit Court
ALBERT E. SPARLING, Defendant-Appellee.	LC No. 12-004990-CK

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

In this case involving a non-compete clause between plaintiff and defendant, plaintiff appeals as of right the trial court's order denying its request for a permanent injunction and granting defendant's motion to dismiss pursuant to MCR 2.504(B)(2). Because defendant was not working for a competitor of plaintiff, we affirm.

Omni Metalcraft, Inc. and plaintiff are two of several commonly owned companies in the material handling industry. Omni and plaintiff supply their respective customers with conveyors for moving industrial products. Defendant worked for Omni from 1986 until December 2008 or January 2009, at which point he was hired by plaintiff as a sales engineer. Defendant's job duties for plaintiff involved soliciting customers and developing specialized equipment for each customer's unique needs. When defendant was hired by plaintiff, he executed an employment contract with the following relevant provisions:

> I also agree that while employed by the Company (and for a period of two (2) years after my employment ends) I will not, without the Company's written consent, perform any services (as an employee or independent contractor or in any other capacity) for myself, any other person or company which makes or sells (or plans to make or sell) any products or service competitive with a product or service offered by the Company. During the two (2) years after my employment ends, this restriction will only apply to the geographic area of the United States. . . . If at any time I begin making plans to leave the Company, I agree to inform the Company immediately, and not make any preparations to leave the Company, or to compete against the Company, without having so informed the Company in advance. . . .

> Except as directed otherwise by the Company, I agree that I will not disclose to anyone, or use for my own purposes, either during or after my employment: (1) any of the Company's confidential or proprietary information, or (2) confidential or proprietary information of customers, vendors or any other party of which I became aware because of my employment with the Company.

In June 2012, defendant resigned from plaintiff. He was to begin working for LEWCO, Inc., an Ohio corporation in the material handling industry. Plaintiff promptly sought to enjoin defendant from working for LEWCO, arguing that LEWCO was a direct competitor in the industry.

According to the testimony of plaintiff's general manager, Omni and plaintiff each operate on a continuum within the material handling industry. Plaintiff's general manager explained that Omni operates near the "standard end of that continuum," i.e., it mostly sells catalog equipment, while plaintiff, on the other hand, operates near the "specialized or custom end," i.e., it mostly sells unique equipment. Defendant testified that LEWCO, like Omni, sells standard equipment. Defendant explained that LEWCO was not a competitor of plaintiff because the former will not accept elevated-risk projects, whereas the latter almost exclusively accepts elevated-risk projects.

The trial court concluded that the non-compete agreement, although reasonable in duration and geographic scope, was unenforceable as a matter of law because it did not protect plaintiff's reasonable competitive business interests and was an unreasonably broad prohibition on field of employment. The trial court alternatively found that defendant did not breach the non-compete agreement because there was little competition between LEWCO and plaintiff. For the same reason, the trial court determined that a permanent injunction was unwarranted because plaintiff would not suffer irreparable harm. The trial court accordingly granted defendant's motion to dismiss.

On appeal, plaintiff argues that the trial court erred in concluding that the non-compete agreement was unenforceable and in alternatively finding that defendant did not breach the non-compete agreement. A motion for involuntary dismissal pursuant to MCR 2.504(B)(2) "is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence," *Samuel D Begola Servs v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), that "on the facts and the law, the plaintiff has no right to relief," MCR 2.504(B)(2). The trial court's ultimate decision on a motion for involuntary dismissal under MCR 2.504(B)(2) is reviewed de novo, and the underlying findings of fact are reviewed for clear error. *Samuel D Begola Servs*, 210 Mich App at 639. Clear error "occurs when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Douglas v Allstate Ins Co*, 492 Mich 241, 256-257; 821 NW2d 472 (2012) (quotation marks omitted).

We review a trial court's decision whether to grant injunctive relief for an abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571 (2007). "An abuse of discretion occurs when a trial court's decision is not within the range of reasonable and principled outcomes." *Id*. We review de novo whether a non-compete provision is reasonable. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 506; 741 NW2d 539 (2007).

MCL 445.774a(1) of the Michigan Antitrust Reform Act, MCL 445.771 *et seq*., reads as follows:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Thus, a non-compete agreement is enforceable if it protects the employer's reasonable competitive business interests and it is reasonable in duration, geographical scope, and line of business. *St Clair Med, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006). A non-compete agreement protects the employer's reasonable competitive business interests if it protects "against the employee's gaining some unfair advantage in competition with the employer, but [does] not prohibit the employee from using general knowledge or skill." *Id*. The employer's reasonable competitive business interests include "preventing the anticompetitive use of confidential information." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158; 742 NW2d 409 (2007) (quotation marks omitted). Reasonable competitive business interests also include protecting "close contact with the employer's customers or customer lists, or cost factors and pricing." *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp*, 511 F3d 535, 547 (CA 6, 2007) (quotation marks omitted). However, the employer's reasonable competitive business interests do not include protecting against the employee's general knowledge and skill acquired during the employment. See *St Clair Med*, 270 Mich App at 267.

When the former employer claims that the former employee has breached a non-compete agreement, the court should issue a permanent injunction prohibiting the former employee from continued employment with the new employer for the duration of the non-compete agreement if the court determines that the non-compete agreement is enforceable, the former employee has breached the non-compete agreement, and injunctive relief is warranted. See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 849 (ED Mich, 1994).

Again, the trial court concluded that the non-compete agreement was reasonable in duration and geographical scope but ultimately was unenforceable as a matter of law because, in part, the language referencing "any products or service competitive with a product or service offered by the Company" was an unreasonably broad prohibition on line of business.

At first glance, it appears to be a close question whether the trial court erred in concluding that the language referencing "any products or service competitive with a product or service offered by the Company" was an unreasonably overbroad prohibition on line of business. On one hand, courts have upheld similar language as reasonably prohibiting employment with another business that provides the same products or services as the former employer. See, e.g., *Coates*, 276 Mich App at 507-508 (language referencing "any enterprise in competition with the Company" reasonably prohibited employment with a graphic communications and advertising

business); *Kelly Servs v Noretto*, 495 F Supp 2d 645, 657 (ED Mich, 2007) (language providing that "I will not compete against [the employer]" reasonably prohibited the former employee from working for another business in the staffing industry); *Lowry Computer Prods, Inc v Head*, 984 F Supp 1111, 1116 (ED Mich, 1997) (non-compete agreement prohibiting competition against the employer was a reasonable prohibition on the former employee from selling barcode systems and related products, not computer products in general).

However, a careful reading of the language at issue indicates that it encompasses a significantly broader range of businesses than the non-compete language in the cases cited in the previous paragraph. For instance, the non-compete agreement in *Coates* referenced "any enterprise *in competition* with the Company." *Coates*, 276 Mich App at 507 (emphasis added). In other words, the plain language of the non-compete agreement in *Coates* prohibited the former employee from working for a business that, considered in its entirety, was in competition with the employer. But in this case, the non-compete agreement prohibits defendant from working for a business that offers a *single* product or service that is "competitive" with any product or service offered by plaintiff, regardless of whether the business is in actual competition with plaintiff. As the trial court noted, the phrase is not limited to "conveyors" necessarily, which means that "anything from wheel barrels to specialized turntables" to move items could be deemed "competitive" with plaintiff's products and services. The non-compete agreement therefore prohibits defendant from working for any business that is in remote competition with plaintiff, which is unreasonably restrictive. See, e.g., *Gateway 2000, Inc v Kelley*, 9 F Supp 2d 790, 798 (ED Mich, 1998) (under Iowa law, language prohibiting "carrying on any business which is directly or indirectly competitive with the business of Employer" was unreasonably restrictive and therefore unenforceable).

When a provision in a non-compete agreement is unreasonable, the court should impose a reasonable provision instead of completely voiding the non-compete agreement. See *Compton v Joseph Lepak, DDS, PC*, 154 Mich App 360, 367; 397 NW2d 311 (1986); *Hubbard v Miller*, 27 Mich 15, 24-25 (1873). Thus, even if the trial court correctly concluded that the non-compete agreement in this case was unreasonably overbroad, the trial court erred in failing to impose a reasonable prohibition. But any error is harmless because the reasonable prohibition would have simply limited defendant from working with a competitor in plaintiff's field of business. The trial court found that plaintiff and LEWCO were not competitors. The court noted that plaintiff "is involved in highly modified conveyors that create dangerous conditions for operators," while LEWCO "manufactures more standardized conveyors and refuses to get involved in high risk projects." The court's findings are not clearly erroneous. Plaintiff's general manager explained that plaintiff sells "specialized or custom" equipment. Defendant testified that LEWCO sells standard equipment and will not accept elevated-risk projects, whereas plaintiff almost exclusively deals with elevated-risk projects. Thus, even with a reasonable prohibition inserted into the contract, plaintiff could not succeed on its claim.

Accordingly, the trial court did not err in dismissing plaintiff's case and in declining to

enter a permanent injunction.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR. 7.219.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello