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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1061, A13-1390

Nott Company,
Appellant,

vs.

Dean Eberhardt, et al.,
Respondents.

Filed June 2, 2014
Affirmed
Hudson, Judge
Dissenting, Stauber, Judge

Hennepin County District Court
File No. 27-CV-11-6787

Norman J. Baer, Kristin B. Rowell, Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota (for appellant)

David A. Schooler, Diane B. Bratvold, Ellen A. Brinkman, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Hudson, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant challenges the district court's grant of judgment as a matter of law based on the district court's determination that respondent's non-compete agreement was not supported by independent consideration. We affirm.

FACTS

In 1993, respondent Dean Eberhardt began working for appellant Nott Company, a supplier of fluid-power components and systems. In January 1999, Nott promoted Eberhardt from an "inside" to an "outside" sales position, which shifted him from a customer-service job to a direct sales position. At the time of his promotion, Eberhardt negotiated a compensation plan that included a base salary and a commission. Nott did not require Eberhardt to sign a non-compete agreement as a part of this compensation package, which was to be effective from February 1, 1999 until February 1, 2000.

On April 7, 1999, Nott sent letters to all outside salespeople informing them that it was instituting a new compensation plan and new non-compete agreement effective May 1, 1999. Under the new compensation plan, outside salespeople would receive a base salary, a commission, and a chance to earn a bonus. The new non-compete agreement contained a two-year restriction on employment with Nott's competitors or customers following termination of employment with Nott.

One outside salesperson, Gary Cable, was allowed to participate in the new compensation plan without signing the new non-compete agreement. Cable, like all outside salespersons except Eberhardt, had an existing non-compete agreement. But,

unlike the two-year restriction in the new non-compete agreement, Cable's 1995 non-compete agreement contained only a one-year restriction on employment. Nott acknowledged that, because the additional year's restriction was material to the company, Nott told all outside salespersons, including Cable, that they must sign the 1999 non-compete agreement.

The April 7 letter to Eberhardt, which came with a copy of the new non-compete agreement, required him to return a signed copy of the letter by April 16 and advised him that the new non-compete agreement "will need to be signed and in place no later than . . . April 30[, 1999]." Eberhardt testified that he never signed a copy of the April 7 letter and that he did not sign the new non-compete agreement until September 9, 1999. Nott employee Christine Tallman created and maintained Trial Exhibit 1, a document titled "Signed Conf. & Non Compete Letters Check Off." Nott's CEO testified that he asked Tallman to track the date on which the signed non-compete agreements were received. Tallman, however, testified that she was asked to track the date that she received either the signed letter or the signed non-compete agreement. The document has only one column titled "Received Date." Eberhardt's "Received Date" is listed as April 26, 1999. Tallman testified that this date could either indicate when she received Eberhardt's signed letter, when she received Eberhardt's signed non-compete agreement, or when she received both. She further testified that, upon receiving a document, she made sure it was signed and entered the current date in the "Received Date" column.

Beginning on May 1, Nott began paying Eberhardt under the new compensation plan, and Eberhardt continued working for the company and accepting compensation

under the new plan. In 2010, Nott fired Eberhardt. Respondent Innovative Fluid Power, Inc. (IFP) hired Eberhardt shortly thereafter, prompting Nott to bring suit for breach of contract, tortious interference with a contract, and tortious interference with prospective business relationships.

A jury trial was held in September and October 2012. At the close of Nott's case-in-chief, Eberhardt moved for judgment as a matter of law (JMOL). The district court concluded that no consideration supported the non-compete agreement. The district court thus granted JMOL on Nott's three claims.[1] Nott moved for a new trial, which the district court denied. This appeal follows.

D E C I S I O N

The district court may grant a JMOL motion when "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmoving] party" on a particular issue. Minn. R. Civ. P. 50.01(a). Such a situation arises when the evidence is insufficient to present a fact question for the jury, *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 405 (Minn. 1998), or when a verdict in favor of the nonmoving party is contrary to law, *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). On review from a district court's granting of a JMOL motion, we conduct a de novo review to "determine whether an issue of fact exists when the evidence is viewed in a light most favorable to the nonmoving party." *Baber v. Dill*, 531 N.W.2d 493, 495 (Minn. 1995).

[1] The parties settled Eberhardt's cross claim that he was due unpaid commissions under Minn. Stat. § 181.13(a) (2012).

Because covenants not to compete are agreements in partial restraint of trade that limit an individual's right to work and earn a livelihood, courts "look upon [non-compete agreements] with disfavor and scrutinize them with care." *Freeman v. Duluth Clinic, Inc.*, 334 N.W.2d 626, 630 (Minn. 1983) (citation omitted). If a non-compete agreement "is not made ancillary to the initial employment contract," it is enforceable "only if it is supported by independent consideration." *Id.*

Nott contends that the district court erred by concluding as a matter of law that no independent consideration supported Eberhardt's non-compete agreement. The district court rested its holding on three determinations. First, the district court determined that no reasonable jury could find that Eberhardt signed the non-compete agreement on April 26 instead of September 9, when Eberhardt's non-compete agreement was dated. Second, notwithstanding the signature date, the district court determined that Eberhardt's continued employment could not constitute consideration for the non-compete agreement because there was no material change in his compensation or employment package. And third, the district court determined that there was no consideration to support the non-compete agreement because Eberhardt did not bargain for it.[2]

A. Signature date

The district court determined that no reasonable jury could find that Eberhardt had signed the letter or the new non-compete agreement on April 26, 1999, instead of on

[2] The district court also determined, irrespective of the signature date, that no reasonable jury could conclude that Eberhardt had received confidential information that could serve as consideration for the non-compete agreement. Because Nott did not brief this issue on appeal, we consider it waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

September 9, 1999, the date on Eberhardt's non-compete agreement. The record indicates that a signed copy of the non-compete agreement was found in Eberhardt's employment file and that the agreement was dated September 9, 1999. Nott employee Christine Tallman testified that she maintained a log memorializing the "Received Date" of either a signed copy of the April 7 letter, a signed copy of the non-compete agreement, or both. Eberhardt's "Received Date" was April 26, 1999. Although Tallman did not specifically recall receiving Eberhardt's signed non-compete agreement on April 26, she testified that she checked the documents that were submitted to her to make sure that they were signed, that she knew Eberhardt and that he submitted either a signed letter or a signed non-compete agreement, and that she did not err in recording the date. For his part, Eberhardt consistently testified that he never signed a copy of the April 7 letter.

"If reasonable jurors could differ on the conclusions to be drawn from the record, judgment as a matter of law is not appropriate." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). Although Tallman's testimony alone does not establish that Eberhardt submitted a signed non-compete agreement on April 26, her testimony that she received either a signed April 7 letter or a signed non-compete agreement from Eberhardt on that date, coupled with Eberhardt's testimony that he never signed the April 7 letter, constitute facts that could lead a reasonable juror to conclude that Eberhardt signed the non-compete agreement on April 26, 1999. Thus, the district court erred to the extent that it relied on the disputed signature date(s) of the relevant documents.

B. No material change in employment status

The district court determined that, even if Eberhardt signed the non-compete agreement on April 26, Eberhardt's continued employment could not serve as consideration for the non-compete agreement because there was no material change in his employment from January to September 1999; Eberhardt did not receive a promotion, a guaranteed term of employment, or "any change in status that was different between January and April and May or September of 1999." The record shows, however, that Eberhardt received a new compensation package beginning in May 1999 and that the parties disputed whether Eberhardt was paid more under the new compensation package. On this record, reasonable jurors could conclude that Eberhardt received the benefit of a new compensation package in exchange for signing the non-compete agreement, and, accordingly, JMOL on this basis was not appropriate. *See Bahr*, 766 N.W.2d at 922.

C. Bargaining

We have concluded that JMOL was not appropriate based on the disputed facts surrounding the signature date of the relevant documents and whether Eberhardt was paid more under the new compensation agreement. Nevertheless, we affirm the district court's grant of JMOL because the district court correctly determined that Eberhardt did not bargain for the new non-compete agreement. The district court determined, and the parties do not contest, that outside salesperson Gary Cable received the same compensation package as Eberhardt but did not sign the 1999 non-compete agreement. The district court held that Eberhardt consequently did not bargain for the agreement, and thus, the new compensation package could not constitute consideration as a matter of law

under *Freeman*, 334 N.W.2d at 630. The application of caselaw to undisputed facts constitutes a legal question for the district court, *In re Estate of Eckley*, 780 N.W.2d 407, 410 (Minn. App. 2010), not a fact question for the jury. We review a district court's application of caselaw to undisputed facts de novo. *Id.*

Continued employment alone is not sufficient to support a non-compete agreement. *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982). The non-compete agreement must be "bargained for and provide the employee with real advantages." *Freeman*, 334 N.W.2d at 630 (citation omitted). A non-compete agreement that has not been bargained for lacks consideration and is not enforceable. *Id.* In *Freeman*, three employees signed the new covenant not to compete, but fourteen other employees did not. *Id.* at 627. Nevertheless, all employees—signers and nonsigners alike—received identical benefits and were compensated under the same formula. *Id.* at 628. The Minnesota Supreme Court held that the non-compete agreement was invalid because "[a]bsolutely no distinction was made between signers and nonsigners." *Id.* at 630.

Thus, if both signers and nonsigners of a non-compete agreement receive the same benefits under an associated compensation plan, a court cannot find that an employee's signing of the non-compete agreement was a condition of receiving the compensation plan. *Freeman*, 334 N.W.2d at 630. In such situations, therefore, there is no bargaining and no consideration. *Id.*

It is undisputed that Cable did not sign the 1999 non-compete agreement. It is also undisputed that all outside salespeople—including Cable—received the same new

compensation plan. Despite these undisputed facts, Nott argues that *Freeman* is inapposite because Cable, who had an existing non-compete agreement in place, was not a "nonsigner" under *Freeman*. Nott stresses that, in *Freeman*, fourteen employees were nonsigners and argues that it would be impractical to "extend" *Freeman* by holding that *every* employee, even those with existing non-compete agreements, was required to sign the new non-compete agreement for it to be enforceable.

For two reasons, we do not view our holding here as an "extension" of *Freeman*. First, courts look upon non-compete agreements with disfavor and construe them strictly. *Matter of Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 371 n.5 (Minn. 1979). Thus, we are not persuaded to consider the ease with which a company may impose a non-compete agreement when reaching our decision. Second, the existence of consideration is a fact-specific determination, *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130 (Minn. 1980), and is not based on bright-line numerical rules. We are convinced that the record in this case supports the district court's conclusion that no consideration supports Eberhardt's non-compete agreement.

Our conclusion is supported by the fact that the difference in term restrictions between the 1995 and 1999 non-compete agreements was material to Nott. Indeed, Nott's CEO testified that the two-year duration in the 1999 non-compete agreement was necessary to sufficiently protect confidential information and customer relationships. Although Cable had an existing non-compete agreement in place, the 1995 agreement was significantly less restrictive—one year instead of two—than the one that Nott imposed on Eberhardt. And Nott acknowledged that the difference was important

enough that the company requested that all outside salespeople with existing non-compete agreements[3]—including Cable—sign the 1999 non-compete agreement. Because Cable did not sign the 1999 non-compete agreement, he was a "nonsigner" under *Freeman*, and thus, there was no consideration for the new non-compete agreement.

Although Nott now claims that receipt of the new compensation package was contingent on signing the 1999 non-compete agreement, our review of the record suggests that Nott was intent on rolling out the new compensation package on May 1 regardless of who signed (or didn't sign) the non-compete agreement. Nott's own records—notably Exhibit 1—documenting when the outside salespeople turned in the signed non-compete agreement, do not support Nott's claim that signing the 1999 non-compete agreement was an absolute condition of receiving the new compensation plan. Although Exhibit 1 is not a model of clarity, it, coupled with the undisputed fact that Cable was paid according to the new compensation plan without signing the 1999 non-compete agreement, shows that Nott intended to launch the new plan without regard for whether all of the outside salespeople actually signed the 1999 non-compete agreement. Consequently, Eberhardt did not bargain for the 1999 non-compete agreement, and it is not supported by consideration as a matter of law. *See Freeman*, 334 N.W.2d at 630.

Because there was no consideration for the 1999 non-compete agreement as a matter of law, the district court did not err by granting JMOL in favor of respondents.

[3] At oral argument, counsel for Nott stated that every outside salesperson besides Eberhardt had an existing non-compete agreement in place prior to the rollout of the 1999 compensation plan and non-compete agreement.

Affirmed.

STAUBER, Judge, dissenting.

I respectfully dissent. The jury, not the district court, should decide issues of fact—here, whether there was consideration provided to the employee in return for his signing a non-compete agreement.

The majority correctly holds that a jury should have considered and decided two of the critical issues in this case, first, whether Eberhardt signed the new non-compete agreement on April 26, 1999, or on September 9, 1999; and second, whether Eberhardt benefitted from his new compensation package when he signed the new agreement. Both are issues material to the dispute.

However, the district court arbitrarily decided that the new non-compete lacked consideration, not because of insufficient enhanced compensation, but because one employee (Cable) did not sign the new agreement in 1999. The majority determined that because Cable received the benefit of the compensation plan without signing the new agreement, which added an additional year to his non-compete, the agreement was void as to all employees.

The majority relies primarily on *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983), where a non-compete was deemed invalid because 14 out of 70 doctors at the Duluth Clinic, Ltd. refused or neglected to sign the agreement. Freeman, a neurosurgeon, signed the non-compete and later breached the agreement by leaving the clinic and starting his own private practice. *Id.* at 628. Justice Yetka, joined by Justice Kelly, dissented, concluding that "[e]ighty percent of the doctors in the Duluth Clinic signed the non-competition provision. There was thus a mutuality of promises, which

has always been held to be an adequate consideration in contract cases." *Id.* at 631 (Yetka, J., dissenting).

Here, only one employee, a special employee who had worked longer than the others and had a unique history and relationship with the company, chose not to sign or simply neglected to sign. Eberhardt signed the new agreement in 1999, and received additional compensation for many years. It is unfair that, after benefitting from his bargain he does not bear the contractual non-compete burden. Further, a holding that one-hundred percent of all similarly situated employees must execute a non-compete agreement for its viability is not commercially practical in a free and competitive society.