[Cite as *Marketing Assoc., Inc. v. Gottlieb*, 2010-Ohio-59.]

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92292

MARKETING ASSOCIATES, INC.

PLAINTIFF-APPELLEE

vs.

MARC GOTTLIEB

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-592332

BEFORE: Boyle, J., McMonagle, P.J., and Celebrezze, J.

RELEASED: January 14, 2010

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Marc Gottlieb, appeals from the judgment in favor of plaintiff-appellee, Marketing Associates, Inc. d.b.a. Astrokam Sales & Marketing Company ("Astrokam"), upon the jury's verdict that he breached his employment agreement. In this appeal, Gottlieb solely challenges the jury's award of $500,000 plus legal fees to Astrokam on its claim for breach of contract, specifically the covenant not to compete.[1] Finding no merit to the appeal, we affirm.

{¶ 2} At trial, the following evidence was introduced:

{¶ 3} In 1973, Dick Rose, the president of Astrokam, hired Gottlieb as a manufacturer's representative. Gottlieb's position involved marketing various manufacturers' products to buyers for retail stores.

{¶ 4} Gottlieb testified that he signed at least five employment contracts during his 33 years of employment with Astrokam, the last being in May of 2000. Pertinent to this appeal, paragraph 7 of the employment agreement provides:

{¶ 5} "Covenant Not to Compete. Employee during the term of his employment with the Company and for one (1) year thereafter, personally or in association with others, will not establish or engage in, directly or indirectly, as an owner, partner, shareholder, consultant, advisor or employee of, as a lender to, or as an investor in, any business which:

{¶ 6} "(a) competes with that carried on by the Company, or

[1] Although the jury also found Astrokam liable on Gottlieb's counterclaim for unpaid commissions and Astrokam filed a notice of cross-appeal, Astrokam later withdrew its cross-appeal.

{¶ 7} "(b) acts as a manufacturer's representative for any product lines represented by the Company at any time during the last twelve (12) months of Employee's employment hereunder,

{¶ 8} "(c) within the geographical area or with named specific accounts outside the geographical area served by the Company at the time (presently Ohio, Western Pennsylvania, West Virginia, and Southern Indiana, Kentucky and Michigan). See map attached as Exhibit B.[2]

{¶ 9} "(d) It is further agreed that in any action for the enforcement of this Covenant Not to Compete, the Company shall, if successful in such action, be entitled to receive all costs reasonably incurred in connection with seeking action for enforcement, including, without limitation, all of its reasonable attorney's fees."

{¶ 10} Gottlieb read the agreement before he signed it and understood that the restrictive covenant protected the company if an employee left and took business with them. Gottlieb knew he was restricted from working for one year for an Astrokam competitor in Astrokam's geographic territory. He also knew what accounts he was responsible for during his employment with Astrokam. Gottlieb also acknowledged that the terms of his employment agreement permitted Astrokam to seek reimbursement of all attorney's fees for enforcement of the covenant not to compete.

{¶ 11} In 1999, Astrokam assigned Gottlieb to represent a company known as True Seating Products, a California company that sold desk chairs to office

supply stores. True Seating wanted to sell to OfficeMax, which was then based in Shaker Heights, Ohio. Gottlieb nurtured this account as an Astrokam employee for four years before making a single sale to OfficeMax in 2002. True Seating later became the largest income producer for Astrokam and accounted for 87 percent of Gottlieb's sales. By 2005, Gottlieb estimated his potential compensation for the coming year at $500,000.

{¶ 12} In August 2005, OfficeMax was sold and announced that it would relocate to Chicago, Illinois. Consequently, True Seating's main concern was that Gottlieb be located in Chicago in order for him to continue representing its products to OfficeMax. Gottlieb was concerned about losing this account and approached Rose about opening an Astrokam office in Chicago. Rose and Gottlieb created a list of manufacturers who they notified about Astrokam opening a Chicago office. The men also discussed other options, including Gottlieb opening his own company in Chicago and "buying out" his noncompete with Astrokam.

{¶ 13} The record contains correspondence between Gottlieb and True Seating setting forth various alternatives to allow for his continued representation of it in Chicago. Gottlieb proposed options including (1) becoming an independent contractor, (2) sharing revenue with Astrokam, or (3) becoming an employee of True Seating. According to Gottlieb, True Seating did not care who Gottlieb was working for as long as he was located in Chicago. Gottlieb testified

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[2]Rose testified that there was no map attached.

that he "would never indicate to True Seating that there was any other option other than" him to serve as their manufacturer's representative. Although Gottlieb said his first option was to remain an Astrokam employee, he pledged to True Seating to "do whatever it takes" to maintain their business.

{¶ 14} In correspondence dated December 19, 2005, Gottlieb notified Rose of his decision to leave his employment with Astrokam, stating inter alia the following:

{¶ 15} "While I agree that a fair resolution to the termination of my covenant not to compete does involve some payment to you by future compensation that I derive from True Seating, I do not agree with the number you indicated in our meeting and want our agreement to be a 'win-win' for both of us."

{¶ 16} In a letter dated January 15, 2006, Gottlieb advised True Seating of his intention to establish an office in Chicago as soon as possible and indicated, "my total effort will be to service OfficeMax and I will not engage in any other activity." Gottlieb continued to negotiate with Rose.

{¶ 17} In March of 2005, Gottlieb submitted a proposal to Rose containing a potential payment to Astrokam of $500,000 for the True Seating account. Rose responded and proposed a price of $600,000. According to Rose, Gottlieb verbally agreed to pay $500,000 for the account, and Rose indicated he would have his attorney prepare the agreement.

{¶ 18} On March 28, 2006, True Seating sent notice that it was terminating its agreement with Astrokam. In April of 2006, Gottlieb refused to sign the

agreement that Rose's attorneys prepared because (1) he did not understand it, and (2) it included terms he never agreed to, including a guarantee from his wife, a promissory note, and a secured interest in his home. According to Rose, Gottlieb stated he had no intention of paying anything on the agreement.

{¶ 19} Upon his departure from Astrokam, Gottlieb opened his own company, MHG Sales, Inc., in Chicago. By the time of trial, MHG Sales represented six manufacturers, three of which Gottlieb had represented during his employment with Astrokam, including True Seating.

{¶ 20} Gottlieb ultimately decided not to pay anything to Astrokam despite his negotiations with Astrokam. In response, Astrokam withheld commissions earned by Gottlieb in 2005 and the first part of 2006.

{¶ 21} Astrokam did not attempt to open an office in Chicago. Rose explained "the discussions started in August that we need to open an office, and the discussions continued all the way through to March that there were those three options. It was concluded in December that Mr. Gottlieb was going to Chicago and he was going to go out own [sic] his own and we would work through an agreement. There was no purpose for me to start dual representation and open an office in Chicago when it was agreed that he was going to go to Chicago and he was going to open the office." By the time Rose realized Gottlieb would not pay Astrokam any money, True Seating had already terminated Astrokam and Gottlieb had promised to represent True Seating in violation of his noncompete agreement.

{¶ 22} At trial, True Seating's president, Dan Tachney, indicated that if Gottlieb had not moved to Chicago to continue to represent True Seating on the OfficeMax account, the likelihood that True Seating would have hired Mr. Rose was "zero."

{¶ 23} In its charge to the jury, the court instructed on Astrokam's claims, which included breaches of Gottlieb's employment agreement, breach of oral contract, tortious interference with Astrokam's business relationships, fraud, breach of duty of good faith and loyalty, and spoliation of evidence. The court also instructed the jury on Gottlieb's counterclaim for recovery of his earned commissions.

{¶ 24} The court then explained the verdict forms and interrogatories to the jury. At this point, the court advised the jury that the amount of damages they assessed "could be anywhere from zero on up depending upon your determination of the preponderance of the evidence * * *."

{¶ 25} The jury returned a verdict, finding that Gottlieb had breached the covenant not to compete and awarded Astrokam $500,000 in damages plus legal fees. The jury also found that Gottlieb had breached the addendum to his employment agreement and awarded Astrokam $11,339.52 for this breach. And although the jury found that Gottlieb had breached his duty of loyalty to Astrokam, it found that such breach did not cause Astrokam any damage.

{¶ 26} The jury further found that Gottlieb was not liable on Astrokam's remaining claims, i.e., oral contract, tortious interference, fraud, and spoliation of

evidence claims, and returned a $400,000 verdict in favor of Gottlieb on his counterclaim for unpaid commissions.

{¶ 27} Astrokam subsequently filed its application for attorney's fees, and Gottlieb moved for judgment notwithstanding the verdict or for a new trial.

{¶ 28} On March 3, 2008, the trial court held a hearing on Astrokam's application for attorney's fees and costs. The trial court denied Gottlieb's post-trial motion and granted Astrokam's application for attorney fees in the amount of $165,000.

{¶ 29} Gottlieb appeals, raising the following three assignments of error:

{¶ 30} "[I.] The trial court erred when it denied Gottlieb's motion for judgment notwithstanding the verdict because Astrokam failed to prove the elements of causation and damages on its breach of contract claim and therefore the jury's verdict for Astrokam on that claim was not supported by sufficient evidence.

{¶ 31} "[II.] The trial court erred when it denied Gottlieb's motion in the alternative for a new trial because the jury's verdict was not supported by sufficient evidence and because the court's refusal to submit a proper jury interrogatory constituted an irregularity in the proceedings.

{¶ 32} "[III.] The trial court erred when it awarded contractual attorneys' fees to Astrokam because Astrokam should not have prevailed on its claim that Gottlieb breached the contract provision entitling Astrokam to recover attorneys' fees."

Judgment Notwithstanding the Verdict

{¶ 33} We review the trial court's ruling on a motion for judgment notwithstanding the verdict ("JNOV") de novo. *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, ¶23. The same standard that is applied to motions for directed verdict applies to motions for JNOV: "* * * we must test whether the evidence, construed most strongly in favor of appellees, is legally sufficient to sustain the verdict." Id. Accordingly, neither the weight of the evidence nor the credibility of the witnesses is considered when undertaking this review. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679.

{¶ 34} Gottlieb maintains that the evidence failed as a matter of law to establish that Astrokam sustained any damage as a proximate result of him breaching his covenant not to compete. According to Gottlieb, the testimony of Tachney (True Seating's president) that he would not hire Rose personally to act as its manufacturer's representative in Chicago proves that Gottlieb's breach did not cause Astrokam any damage. Gottlieb contends that this testimony definitively establishes that True Seating would not have continued its relationship with Astrokam regardless of his actions. For example, he argues that had he retired, instead of servicing True Seating in violation of his covenant not to compete, Astrokam would still have not gotten the business. In further support of this argument, Gottlieb relies on the fact that True Seating terminated its relationship with Astrokam before Gottlieb had left its employ. Construing the

evidence in a light most favorable to Astrokam, however, we find that reasonable minds could disagree with Gottlieb's interpretation.

{¶ 35} Gottlieb notified Astrokam in December 2005 that he was severing his employment relationship. At that time, he acknowledged the obligations of his covenant not to compete. The testimony of the various parties established that Gottlieb proposed buying out his covenant not to compete in order to represent True Seating by offering Astrokam a potential payment of $500,000 upon the occurrence of certain terms.

{¶ 36} Gottlieb's relationship with True Seating was developed as a result of his employment with Astrokam, which funded the bulk of the expenses as Gottlieb nurtured the account for four years without any sales. Gottlieb understood that the covenant not to compete protected the company if an employee left and took business with them. Gottlieb acknowledged that he enjoyed a close relationship with True Seating that Rose did not have. This bond was developed during his employment with Astrokam. The fact that Tachney may not have hired Rose personally does not mean he would not have hired Astrokam. There is no evidence in the record that True Seating insisted upon Gottlieb being its exclusive representative. Rather, the evidence reveals that True Seating insisted on wanting its representative to be in Chicago. Gottlieb's testimony revealed that True Seating did not care who he worked for as long as True Seating's manufacturer's representative was in Chicago to service OfficeMax.

{¶ 37} In fact, based on the following testimony elicited from Tachney, reasonable jurors easily could have concluded that Astrokam could have maintained the account absent Gottlieb's breach of his covenant not to compete:

{¶ 38} "Q. Did you ever tell Dick Rose or anyone at Astrokam that you wouldn't do business with Astrokam if they opened a Chicago office with anyone other than — with anyone other than Marc Gottlieb?

{¶ 39} "A. * * * Never did tell that to anybody, no. Never did say that."

{¶ 40} Tachney also testified that "if Marc Gottlieb *and Astrokam* wanted to continue to represent True Seating Concepts and True North America, that they would have to move to Chicago * * * [because] you have to have local representation in order for you to continue to grow your business." (Emphasis added.) Indeed, if Astrokam opened an office in Chicago and Gottlieb moved there, Tachney said True Seating would have "absolutely" used them as its manufacturer's representative. Tachney recalled telling Gottlieb "of course that True Seating would stay with Astrokam if they established an office in Chicago."

{¶ 41} The facts of this case are not analogous to *Planmatics, Inc. v. Showers* (4th Cir. 2002), 30 Fed.Appx. 117, 119, upon which Gottlieb relies. In *Planmatics*, the customer had terminated the employer for reasons having no connection to the employee's actions. In this case, True Seating terminated Astrokam only after (1) Gottlieb promised to represent True Seating himself in Chicago, and (2) Gottlieb told Tachney that Astrokam refused to open a Chicago office.

{¶ 42} By the time True Seating terminated Astrokam, Gottlieb had already promised that he would do whatever it took to maintain True Seating's business. Based on Gottlieb's assurances and representations, there was arguably no need for True Seating to retain Astrokam, which would have had to assign a new individual to represent it. Indeed, Rose believed it would have been fruitless for him to open an office and attempt to compete in Chicago after Gottlieb took the True Seating business in breach of his covenant not to compete. Reasonable minds could, and did, agree.

{¶ 43} Gottlieb's argument that Astrokam would not have retained the business if he had retired instead of breaching his covenant not to compete is purely speculative and not supported by the record. The fact remains that Gottlieb did not retire; he opened his own business in Chicago and took a named account from his employment with Astrokam — True Seating — in breach of the terms of his covenant not to compete. As a consequence, Astrokam lost its largest revenue producer. Had Gottlieb abided by the terms of his contract, he would not have been able to serve as the manufacturer's representative for True Seating for one year from the termination of his Astrokam employment. In that case, it is possible that Astrokam could have continued its representation of True Seating by hiring an Astrokam employee to service OfficeMax in Chicago.

{¶ 44} There is evidence that establishes Astrokam's loss of the revenue from the True Seating account was a proximate result of Gottlieb's breach of his covenant not to compete. Certainly the jury could have interpreted the evidence

as Gottlieb did, but there is competent, credible evidence in the record that would support the contrary conclusion that the jury ultimately reached. Therefore, construing the evidence most strongly in favor of Astrokam, as we must, the trial court did not err by denying Gottlieb's JNOV motion.

{¶ 45} This first assignment of error is overruled.

Motion for a New Trial

{¶ 46} In his second assignment of error, Gottlieb maintains he was entitled to a new trial pursuant to Civ.R. 59(A)(1), which allows for a new trial based on an irregularity in the proceedings preventing the aggrieved party from having a fair trial. He argues that the trial court's refusal to submit his proposed jury interrogatory amounted to an irregularity depriving him of a fair trial. He further contends that the trial court should have granted his motion under Civ.R. 59(A)(6) because the judgment is not sustained by the weight of the evidence. We disagree.

{¶ 47} The decision to grant or deny a motion for new trial rests in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Sharp v. Norfolk & W. Ry. Co*., 72 Ohio St.3d 307, 312, 1995-Ohio-224. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Further, a reviewing court will not reverse a judgment as being against the manifest weight of the evidence when the judgment is supported by some competent, credible

evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280.

Proposed Jury Interrogatory

{¶ 48} Gottlieb maintains the exclusion of an interrogatory, in the form he proposed, resulted in an irregularity in the proceedings that entitled him to a new trial.

{¶ 49} "Although Civ.R. 49(B) mandates the submission of requested interrogatories, the court still has the discretion to reject interrogatories that are ambiguous, confusing, redundant, or otherwise legally objectionable." *Nakoff v. Fairview Gen. Hosp*. (1996), 75 Ohio St.3d 254, citing *Ramage v. Cent. Ohio Emergency Serv., Inc*. (1992), 64 Ohio St.3d 97. "Proper jury interrogatories must address determinative issues and must be based upon trial evidence." *Ramage*, 64 Ohio St.3d 97, 107; see, also, *Ragone v. Vitali & Beltrami, Jr., Inc*. (1975), 42 Ohio St.2d 161,165-166 ("[a]uthority is still vested in the judge to control the substance and form of the questions, and if the interrogatories are not based on the evidence, are incomplete, ambiguous or otherwise legally objectionable, the judge need not submit them to the jury.")

{¶ 50} Civ.R. 49 provides "discretion in the court to pass upon the content of requested interrogatories as they 'shall be submitted to the jury in the form that the court approves.'" *Ragone* at165.

{¶ 51} The sole interrogatory at issue states the following:

{¶ 52} "If the Defendant had resigned from Astrokam but had not gone into competition with Astrokam, would Astrokam have retained the representation of True Seating to OfficeMax in Illinois?"

{¶ 53} The trial court did not abuse its discretion by excluding this interrogatory. It is confusing and misleading and not based on any evidence in the record. Defendant did not simply resign and stop working; he competed with Astrokam. And Tachney testified he absolutely would have retained Astrokam if it had opened a Chicago office.

{¶ 54} The court conveyed two interrogatories as requested by Gottlieb verbatim as follows:

{¶ 55} "Interrogatory No. 2

{¶ 56} "A. Did paragraph 7 of the Defendant's Employment Agreement, the Covenant Not to Compete, prohibit him from representing True Seating in Chicago?

{¶ 57} "B. If the Covenant Not to Compete prohibited the Defendant from representing True Seating in Chicago, was that restriction reasonable?"

{¶ 58} In place of the subject interrogatory, the court approved an interrogatory in the following form:

{¶ 59} "C. If so, did the Defendant breach Paragraph 7 of Defendant's Employment Agreement, the Covenant Not to Compete, by representing True Seating to OfficeMax in Chicago?"

{¶ 60} The court also excluded Gottlieb's other proposed interrogatory: "If the Defendant violated his Covenant Not to Compete, and the Plaintiff would have retained the representation of Astrokam if he had not gone into competition with Plaintiff, did the Plaintiff suffer damages as a result?"[3] In its place, the court submitted an interrogatory in the following form:

{¶ 61} "D. If answers to A, B and C were yes, what amount of damages will compensate the Plaintiff for Defendant's breach of the Covenant Not to Compete by representing True Seating to OfficeMax?"

{¶ 62} The content of the court-approved interrogatories addressed the determinative issues and was based upon the trial evidence.

{¶ 63} The trial court properly instructed the jury on the necessary elements of Astrokam's claim for breach of the noncompete. These instructions detailed at length the requirement that Astrokam prove not only a breach by Gottlieb but also that the breach proximately caused damages. The jury was told that it could award damages "anywhere from zero on up depending upon [its] determination of the preponderance of the evidence."

{¶ 64} The trial court did not abuse its discretion by controlling the substance and form of the interrogatory that was submitted to the jury. Gottlieb's claims that he was entitled to a new trial pursuant to Civ.R. 59(A)(1) on this basis are without merit and overruled.

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[3]Gottlieb has not raised the exclusion of this interrogatory as an error in this appeal.

Civ.R. 59(A)(6) - The Weight of the Evidence

{¶ 65} "Civ.R. 59(A)(6) authorizes the trial court to vacate a judgment and order a new trial on a finding that the verdict on which the judgment was entered 'is not sustained by the weight of the evidence.' When that claim is made, the court must review the evidence and pass in a limited way on the credibility of the witnesses. It must appear to the court that a manifest injustice has been done and that the verdict is against the manifest weight of the evidence. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82. * * * A verdict is not against the manifest weight of the evidence merely because the judge would have decided the case differently." (Internal citations omitted.) *Bedard v. Gardner*, 2d Dist. No. 20430, 2005-Ohio-4196, ¶23-24.

{¶ 66} In support of his argument for a new trial based on the weight of the evidence, Gottlieb relies upon the arguments he raised in his first assignment of error. Having reviewed the record, we do not find that the jury's verdict was against the weight of the evidence or that the trial court abused its discretion by denying Gottlieb's motion for a new trial on this basis. There is competent, credible evidence in the record that would support the jury's verdict.

{¶ 67} Accordingly, the second assignment of error is overruled.

Attorney's Fees

{¶ 68} In his final assignment of error, Gottlieb argues that the trial court erred in awarding attorney's fees. Gottlieb, however, concedes that if Astrokam

was entitled to judgment on its claim for breach of covenant not to compete, it is entitled to recover attorney's fees pursuant to the following provision:

{¶ 69} "It is further agreed that in any action for the enforcement of this Covenant Not to Compete, the Company shall, if successful in such action, be entitled to receive all costs reasonably incurred in connection with seeking action for enforcement, including, without limitation, all of its reasonable attorney's fees."

{¶ 70} Based on our disposition of the previous assignments of error, this assignment of error is moot and overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR