STATE OF MICHIGAN

COURT OF APPEALS

EASTSIDE DELI SUPPLY, INC.,

Plaintiff-Appellee,

v

DANIEL CLARENCE BRISSON,

Defendant-Appellant.

UNPUBLISHED
September 30, 1997

No. 194304
Midland Circuit Court
LC No. 95-004244-CK

Before: Corrigan, C.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

In this contract action, defendant appeals by right the default judgment and award of $19,391.42 in favor of plaintiff. We affirm, but remand for a recomputation of damages.

In February 1995, the parties contracted for the sale of defendant Daniel Brisson's sandwich business to plaintiff Eastside Deli Supply for $3,500--$3,000 for the customer list and $500 for equipment. Under the purchase agreement, defendant agreed to execute a covenant not to compete. Defendant, however, did not comply with that term of the purchase agreement and competed with plaintiff for his former customers. Plaintiff then sued, seeking specific performance of the covenant not to compete, injunctive relief and damages for breach of contract. When defendant failed to file a timely response, plaintiff moved for entry of default. Although defendant eventually retained counsel, with defendant's permission his attorney later withdrew without contesting the default. The court entered a default judgment on December 15, 1995, and awarded damages of $19,391.42 to plaintiff. The court denied defendant's subsequent motion to set aside the default.

Defendant first argues that the circuit court abused its discretion in refusing to set aside the default judgment because he never signed a covenant not to compete and the relief granted did not include an order compelling defendant to execute such an agreement. We disagree. We review for an abuse of discretion a decision regarding a motion to set aside a default judgment. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

The entry of a default operates as an admission by the defaulting party that no issues of liability remain. *Perry v Perry*, 176 Mich App 762, 767; 440 NW2d 93 (1989). Accordingly, defendant's

failure to respond to the complaint is deemed to constitute an admission that he breached the purchase agreement after plaintiff fully performed. Thus, the trial court did not abuse its discretion by refusing to set aside the default judgment. While defendant's claim that he was never paid the full amount of the consideration is relevant to whether he has stated a meritorious defense, he has not shown good cause for the judgment to be set aside, as discussed *infra*. Moreover, because "equity will regard that as done which ought to be done," *Warren Tool Co v Stephenson*, 11 Mich App 274, 295-296; 161 NW2d 133 (1968) (citation omitted), the trial court did not err in treating defendant as if he had entered into the covenant not to compete because he expressly had agreed to do so in the purchase agreement.

Defendant also contends that the purchase agreement is too vague to be enforceable with regard to the terms of any covenant not to compete. MCL 445.774a; MSA 28.70(4a) specifically permits covenants not to compete in an employer/employee relationship if such agreements are reasonable as to their duration, geographical area, and the type of employment or line of business. The statute expressly provides that "[t]o 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." MCL 445.774 a(1); MSA 28.70 (4a)(1). Although defendant was not plaintiff's employee, the analysis of the covenant not to compete applies. Therefore, we examine whether the noncompetition covenant was reasonable.

The purchase agreement stated that defendant would "execute a covenant not to compete in the State of Michigan for (5) years." Enforcing an covenant not to compete that encompassed the entire state of Michigan would be unreasonable when the business is a local enterprise. The circuit court reasonably limited the terms in the purchase agreement to encompass only defendant's former customers and the area "within five miles of any of the locations" of those former customers.

Moreover, the facts show that defendant solicited back the very business that he previously had sold to plaintiff. "There can be no doubt that, under Michigan law, the sale of a business along with its accompanying good will gives rise to a covenant precluding the seller form soliciting back to himself that which he has sold." *Worgess Agency, Inc v Lane*, 66 Mich App 538, 544; 239 NW2d 417 (1976). Consequently, the court acted within its authority; defendant's argument does not provide grounds for reversal.

Next, defendant contends that because he has shown good cause and a meritorious defense, the trial court abused its discretion in refusing to set aside the default judgment. Except when grounded on lack of personal jurisdiction over the defendant, a motion to set aside a default judgment generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Park*, *supra* at 66-67. Defendant argues that good cause exists because manifest injustice will result if the judgment is allowed to stand. See *id*. at 67. We disagree. "A person seeking equity should be barred from receiving equitable relief if there is any indication of overreaching or unfairness on this person's part. The unfair or overreaching conduct need not be actionable in any way. It need only be a wilful act that transgresses the equitable standards of conduct." *Royce v Duthler*, 209 Mich App 682, 688-689; 531 NW2d 817 (1995). If plaintiff failed to pay as required under the

purchase agreement, defendant's proper recourse would have been to bring suit for the unpaid balance. Instead, defendant admittedly entered into competition with plaintiff and solicited his former customers. Such behavior contravenes equitable standards of conduct and precludes defendant from acquiring equitable relief. See *id*. at 689. Consequently, the trial court did not abuse its discretion in denying defendant's motion to set aside the default judgment.

Finally, defendant contends that the trial court clearly erred when it adopted plaintiff's calculation of the damages because plaintiff miscalculated the number of weeks in the period from April 1 to December 15. We agree. We review for clear error a trial court's determination of the amount of damages. *Triple E Produce Co v Mastronardi Produce Ltd*, 209 Mich App 165, 177; 520 NW2d 772 (1995).

Plaintiff's representative, Jeff Jacobs, testified that plaintiff lost an average of $403.98 per week for forty-eight weeks—between April 1, 1995 and December 15, 1995. That time period, however, contains only thirty-seven weeks. The trial court stated that because defendant presented no evidence on damages, the court had no alternative than to order the relief requested by plaintiff. The award, however, cannot be justified on the evidence presented because plaintiff did not ask for, or present any proofs with regard to, future damages.

Moreover, plaintiff's figures regarding damages are unclear—they do not appear to be reconcilable to either the testimony or plaintiff's final computations. We therefore remand for the limited purpose of a recomputation of damages. See generally, *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 46-48; 550 NW2d 809 (1996). We caution, however, that this remand is not designed for defendant to reopen the proofs. Defendant had the opportunity at the default hearing to counter plaintiff's figures and failed to do so. On remand, the trial court should correct the error on the record as it exists.

Affirmed, but remanded for a recalculation regarding damages. No taxable costs under MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra