IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2005-CA-01864-COA

JOHN MICKALOWSKI AND JAMIE MICKALOWSKI	**APPELLANTS**
v.	
AMERICAN FLOORING, INC. AND JIM CHRESTMAN	**APPELLEES**

DATE OF JUDGMENT:	08/25/2005
TRIAL JUDGE:	HON. SHARION R. AYCOCK
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	GEORGE E. DENT ANNA CATHERINE PIPKIN
ATTORNEY FOR APPELLEES:	MICHAEL LEE DULANEY
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	DEFENDANT/APPELLANT VIOLATED THE TERMS OF THE NON-COMPETE AGREEMENT; PLAINTIFF/APPELLEE AWARDED $90,000 IN COMPENSATORY DAMAGES, $25,000 IN PUNITIVE DAMAGES, AND $19,095.06 IN ATTORNEY'S FEES. TRIAL COURT ALSO AWARDED DEFENDANT/APPELLEE $2,622 ON DEFENDANT'S COUNTERCLAIM.
DISPOSITION:	AFFIRMED - 05/29/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC

LEE, P.J., FOR THE COURT:

FACTS AND PROCEDURAL HISTORY

¶1. The conflict in this case centers around a covenant not to compete entered into by the parties when John and Jamie Mickalowski sold their retail flooring business, American Flooring, Inc., to Jim Chrestman.

¶2. The Mickalowskis owned and operated American Flooring and Floors 4 Less (both operated as American Flooring), a retail ceramic tile store, in Lee County, Mississippi, near the town of Saltillo. On July 21, 2000, the Mickalowskis entered into a contract with Chrestman, whereby Chrestman agreed to purchase all of the assets of the flooring business. Chrestman paid $329,227 for the business and an additional $90,000 for the covenant not to compete. The non-compete agreement prohibited the Mickalowskis from engaging in retail sales of ceramic tile and other flooring. However, the Mickalowskis reserved the right to engage in the wholesale distribution of tile "from time to time." The terms of the agreement will be discussed in more detail as applicable.

¶3. Chrestman became aware of several violations of the agreement and filed a complaint on October 30, 2001, in the Circuit Court of Lee County seeking injunctive relief, compensatory damages, punitive damages, attorney's fees and expenses, and any other relief available at law or in equity. During the bench trial, the trial court heard testimony regarding alleged retail sales, sales to other retailers in Lee County without proper notice, and sales to retailers outside Lee County but within the restricted area without proper notice. The trial court also heard testimony regarding two retail ceramic tile stores in which John Mickalowski allegedly had some involvement. The trial court entered an opinion on August 25, 2005, finding that the Mickalowskis willfully violated the terms of the non-compete agreement by selling tile to retail customers and by selling tile wholesale both inside and outside Lee County without proper notification to Chrestman. In the final judgment dated October 21, 2005, the trial court awarded Chrestman $90,000 in compensatory damages, $25,000 in punitive damages, and $19,095.06 in attorney's fees.

¶4. The Mickalowskis now appeal the circuit court's decision to this Court asserting the following issues: (1) the trial court erred in finding that they violated Section 6.1, the covenant not to compete; (2) the trial court erred as a matter of law in finding that they violated 6.1.a.a. of the

agreement by failing to give American Flooring notice of the proposed sale of wholesale tile to Tupelo Lumber; (3) the trial court erred as a matter of law in finding that they breached 6.1.a.b. of the agreement in that notices of wholesale sales outside of Lee County were required only if the purchaser establishes a retail presence outside of Lee County; (4) the trial court erred in assessing damages at $90,000; (5) the trial court erred in assessing punitive damages; and (6) the trial court erred in awarding attorney's fees. For judicial economy, Issue I will be combined with Issues II and III. Issues IV, V, and VI will also be combined as each addresses the issue of damages.

¶5. Finding no error, we affirm.

STANDARD OF REVIEW

¶6. A trial judge's findings of fact following a bench trial will not be disturbed on appeal as long as they are supported by substantial, credible and reasonable evidence. *City of Jackson v. Brister*, 838 So. 2d 274, 277-78 (¶13) (Miss. 2003). Issues of law, however, are reviewed under a *de novo* standard. *Id.*

DISCUSSION

I. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN FINDING THAT THE MICKALOWSKIS VIOLATED 6.1.a.a. OF THE AGREEMENT BY FAILING TO GIVE AMERICAN FLOORING NOTICE OF THE PROPOSED SALE OF WHOLESALE TILE TO TUPELO LUMBER

The covenant not to compete

¶7. The covenant not to compete set forth the following restrictions on the Mickalowskis' business activities. Under Section 6.1 of the agreement, the Mickalowskis agreed not to compete, directly or indirectly, with Chrestman in the ceramic tile and flooring businesses for five years after the sale of American Flooring. This restriction was limited to "a one hundred (100) mile radius from the premises where the Business is located." Notwithstanding the one hundred mile restriction, Section 6.1.a. of the agreement stated that the Mickalowskis would be permitted to engage "in the

wholesale distribution, from time to time, of ceramic tile (the "Wholesale Tile") within a fifty (50) mile radius from the premises where the Business is located (the "Wholesale Territory")," subject to the following conditions and restrictions:

> a. Purchaser shall have the exclusive right of first refusal, in its sole discretion, to carry for retail sale and to purchase from Seller any and all lines of the Wholesale Tile in Lee County, Mississippi. In furtherance of this right of first refusal, Seller agrees as follows:
>
> i. Before selling any Wholesale Tile to any person or entity inside Lee County, Mississippi, Seller shall first offer such Wholesale Tile to Purchaser in writing.
>
> ii. Within 30 days of its receipt of the written offer provided for in the preceding paragraph, Purchaser shall notify Seller whether it intends to exercise its right of first refusal to carry and to purchase from Seller such lines of Wholesale Tile in Lee County, Mississippi.
>
> iii. If and only to the extent that Purchaser elects not to exercise its right of first refusal as to said Wholesale Tile, Seller shall be free to sell same to other purchasers in Lee County, Mississippi; provided, however, that if Purchaser later decides that it wants to carry and purchase any such lines of Wholesale Tile in Lee County, Mississippi, Seller agrees to accept no further orders for said Wholesale Tile from the existing purchaser(s) thereof in said county.

Wholesale activities within Lee County

¶8. Section 6.1.a.a. of the covenant not to compete allowed the Mickalowskis to engage in wholesale distribution "from time to time" with the condition that American Flooring was given the right of first refusal on the sales in Lee County. With regard to sales in Lee County, the trial court concluded that the Mickalowskis violated the agreement with regard to their business relationship with Tupelo Lumber. Specifically, the trial court stated that "the Defendants violated the terms and conditions of Section 6.1.a. dealing with proposed wholesale sales within Lee County when the Defendants failed to notify in writing the Plaintiff regarding the proposed sale to Tupelo Lumber," and a sale to Tupelo Lumber would be in direct competition with Chrestman's store.

¶9. The Mickalowskis gave notice of the first proposed sale within Lee County in accordance with Section 6.1.a. of the agreement, and Chrestman chose not to exercise his right of first refusal on this particular sale. However, when the Mickalowskis offered tile to Tupelo Lumber, they did not give American Flooring notice and the opportunity to exercise its right of first refusal as required in the contract. John Mickalowski argues that, while no specific notice was given, he would send an updated price list periodically which constituted notice. Jamie Mickalowski acknowledged that Tupelo Lumber did not sell ceramic tile and would be in direct competition with American Flooring if they were to do so. We are not persuaded by John Mickalowski's assertion that mailing updated price lists served as notices for Chrestman to exercise his right of first refusal. This is especially true for Section (b) which required the notice to include "a description and location of the proposed purchaser, and a description of the Wholesale Tile which Seller proposes to sell to said prospective purchaser."

Retail sales

¶10. The covenant not to compete expressly prevented the Mickalowskis from participating in any retail sales within 100 miles of the physical location of Chrestman's business for a period of five years, beginning on July 21, 2000. Two or three months after the Mickalowskis sold American Flooring to Chrestman, John Mickalowski constructed a large warehouse and opened Old World Tile, a wholesale ceramic tile store, in Booneville, Mississippi, which was outside of Lee County but within approximately fifteen miles of the current location of American Flooring. Chrestman testified that he began hearing about retail cash sales to customers by Old World Tile and was concerned about the size of Mickalowski's new business. Chrestman believed that John Mickalowski was violating the terms of the non-compete agreement, which only allowed him to engage in wholesale business in the restricted area "from time to time." According to John's testimony, Old World Tile

was the only tile distributor in northeast Mississippi and the largest source of wholesale tile in northeast Mississippi. It grossed approximately $800,000 in 2004. Chrestman's disapproval is reflected in the business relationship between Chrestman and Mickalowski. Between July and September 2001, Chrestman purchased $68,496.21 in tile from Old World Tile. Between September 2001 and July 2005, Chrestman purchased only $5,034.25 in tile from Old World Tile. After hearing evidence that American Flooring stopped purchasing wholesale tile from Old World Tile, it was apparent to the trial judge that "Mr. Mickalowski perceived that it was a 'condition precedent' that American Flooring sell Old World Tile, otherwise, the Mickalowskis perceived they were under no obligations to honor the terms of the Purchase and Sale Agreement." Nothing of this nature appears in the covenant not to compete and the Mickalowskis should not be allowed to use this as an excuse for violating the covenant not to compete.

¶11. The trial court also heard testimony regarding two retail ceramic tile stores in which John Mickalowski allegedly had some involvement. In June of 2002, after Chrestman moved American Flooring to another location, Tony Kendrick opened a retail ceramic tile store, The Tile Depot, in the half of Mickalowski's building that originally housed Chrestman's store. Kendrick, a former employee of the Mickalowskis and Chrestman, testified that John Mickalowski approached him about opening a retail store and proposed that he and Kendrick be "silent partners." No documents exist outlining the terms of Kendrick's partnership with Mickalowski. However, Kendrick testified that no written agreement was made because John Mickalowski wanted the arrangement to be verbal because he could not personally sell to anyone not having a tax identification number due to the non-compete clause. Mickalowski denied any such relationship. Kendrick testified that Mickalowski provided everything necessary for the operation of the store, including personally moving computers, fixtures, displays, and office equipment into the building. Kendrick further testified that when the

store was not successful, Mickalowski changed the terms of the deal so that Kendrick became nothing more than an employee.

¶12. The evidence was uncontradicted that Chrestman personally observed John Mickalowski coming to and from The Tile Depot. Kendrick testified that he personally witnessed the Mickalowskis sell tile to the public. He testified that customers contacted him to inquire about installing tile purchased from Old World Tile. He also testified that the Mickalowskis sold tile to him without him having a sales tax number, and he testified that the Mickalowskis had given him samples to go sell tile to others. Kendrick further testified that he knew about the non-compete agreement because John Mickalowski warned him that Chrestman did not need to find out about the retail sales because the sales violated the non-compete clause. From this testimony, the trial judge determined that the Mickalowskis were aiding and assisting in the operation of The Tile Depot in violation of the non-compete agreement.

¶13. John Mickalowski argues that Kendrick's testimony is unreliable because at some point Kendrick was unable to continue paying for the tile and Mickalowski repossessed the remaining unsold tile. Kendrick was ultimately arrested and John Mickalowski argues that Kendrick blames him for the failure of his business and for his arrest for failure to deliver tile which Kendrick sold to a local governmental agency. The charges against Kendrick were later dismissed. Mickalowski argues that the agreement did not preclude him from leasing the building for fair market value regardless of the product sold. However, Chrestman argues that, at the least, the deal amounted to aiding and assisting a competitor.

¶14. Keith Phillips, an employee of the Mickalowskis, testified that he had personally read the non-compete agreement during his employment. He testified to witnessing people come into Old World Tile, look at samples, buy the tile, and leave with it in hand. He also testified that John

Mickalowski told him that if Chrestman would not buy tile from Old World Tile then he would sell it to Chrestman's prospective customers. Phillips further testified that John kept an invoice book on his desk in Earl Owen's trade name to make it appear that tile was being sold by Earl Owens and not Old World Tile. Ed Neely, a construction inspector and appraiser, testified that John told him that he could not sell him tile since he was "wholesale only." However, Neely testified that he bought tile through Earl Owens even though he selected tile at Old World Tile using Old World Tile's samples and was never shown any samples by Earl Owens. Earl Owens testified for the defense that to his knowledge Old World Tile did not sell to retail customers.

¶15. Another instance of a retail store in which John Mickalowski allegedly had some involvement was with his brother, Jerry Mickalowski. After Kendrick's business failed, John rented the other half of the building to his brother who opened a retail tile store. Mickalowski testified that he charged his brother fair market value for the rent on the building and did not assist his brother in any way in running the store. Ultimately, the store was unsuccessful. Chrestman argues that allowing a direct competitor to establish a business approximately one mile from his location provided more evidence that the Mickalowskis intended to violate the covenant not to compete.

¶16. Given the evidence, we find that the trial judge did not err in finding a violation of Section 6.1.a. of the agreement regarding sales within Lee County, and her decision is affirmed as it was based on substantial evidence. Further, substantial evidence exists to support the trial court's conclusion that the Mickalowskis made retail sales through Old World Tile, and the evidence shows that their wholesale distribution exceeded the "from time to time" limitation.

> II. DID THE TRIAL COURT ERR IN FINDING THAT THE MICKALOWSKIS BREACHED 6.1.a.b. OF THE AGREEMENT IN THAT NOTICES OF WHOLESALE SALES OUTSIDE OF LEE COUNTY WERE REQUIRED ONLY IF THE PURCHASER ESTABLISHED A RETAIL PRESENCE OUTSIDE OF LEE COUNTY

¶17. Section 6.1.a.b. of the agreement set out the following restrictions with regard to wholesale activities outside Lee County but within a fifty mile radius from the premises where the business is located (the "Wholesale Territory"):

> b. Purchaser shall have the exclusive right of first refusal, in its sole discretion, to carry for retail sale and to purchase from Seller any and all lines of the Wholesale Tile in any area outside of Lee County, Mississippi but within the remainder of the Wholesale Territory, in which Purchaser establishes a retail presence. In further [sic] of this right of first refusal, Seller agrees as follows:
>
> i. Before selling the Wholesale Tile to any person or entity outside of Lee County, Mississippi, but within the geographic limits of the Wholesale Territory, Seller shall give Purchaser advance written notice of its intention to sell said Wholesale Tile, which notice shall include a description and location of the proposed purchaser, and a description of the Wholesale Tile which Seller proposes to sell to said prospective purchaser.
>
> ii. Within 30 days of its receipt of the written notice provided for in the preceding paragraph, Purchaser shall notify Seller whether it intends to exercise its right of first refusal to carry for retail sale and to purchase from Seller said lines of Wholesale Tile in said area.
>
> iii. If and only to the extent that Purchaser elects not to exercise its right of first refusal as to said Wholesale Tile in said geographic area, Seller shall be free to sell same to said prospective purchaser; provided, however that if Purchaser later decides that it wants to carry and purchase said Wholesale Tile in said geographic area, Seller agrees to accept no further orders fro [sic] said Wholesale Tile from the existing purchaser(s) thereof in said area.

¶18. With respect to Section 6.1.a.b. – sales outside of Lee County – the proof is uncontradicted that no notices were given to Chrestman. Chrestman testified that American Flooring does business in all of northeast Mississippi and advertises throughout northeast Mississippi. We find that the trial court correctly stated that "the language in (b) establishes that American Flooring *already* had an established retail presence outside of Lee County but within the 50 mile radius or else there would have been no reason to include (b) in the Agreement." (emphasis added). At the time of the agreement, Chrestman's store was located in Lee County five miles from the Prentiss County line.

It would not be reasonable to require him to open another location five miles away to trigger Section 6.1.a.b. American Flooring was already doing business in Prentiss County, and Chrestman testified that he had established a retail business in northeast Mississippi that included Tippah County, Corinth, Monroe County, and the general northeast Mississippi area. According to Chrestman, he advertised in all of these areas and more than fifty percent of his business came from outside Lee County.

¶19. John Mickalowski testified that he sold wholesale tile to the following entities: Perry's at Booneville, Earl Owens, Southland, Collier-Windham, Booneville Flea Market, Amanda Oust, Leslie's Floors, and Wren's Carpets. Upon questioning, he stated that all these businesses were within a fifty mile radius of American Flooring and all of the businesses were located outside of Lee County. John admitted that he did not give notice on these sales pursuant to the agreement. He also admitted that the sales were in direct competition with American Flooring and agreed that had proper notice been given, Chrestman would have had an opportunity to block the sales to these entities had he chosen to exercise his right of first refusal.

¶20. The Mickalowskis should have been put on notice from the terms in the agreement that Chrestman already had a retail presence in Northeast Mississippi. If this were not true then Section (b) would have been unnecessary. Further, Section 6.a.b.i. specifically states, "Before selling the Wholesale Tile to *any* person or entity outside of Lee County, Mississippi, but within the geographic limits of the Wholesale Territory, Seller shall give Purchaser advance written notice of its intention to sell said Wholesale Tile." (emphasis added). Since Chrestman had a retail presence within the restricted area, the Mickalowskis should have known that they must give notice before selling to any person or entity in the area.

¶21. We find that the decision of the trial court was based on substantial evidence and should be affirmed. This issue is without merit.

III. DID THE TRIAL COURT ERR IN ITS AWARD OF COMPENSATORY DAMAGES, PUNITIVE DAMAGES, AND ATTORNEY'S FEES

¶22. The Mickalowskis argue that damages are not appropriate since they did not violate the covenant not to compete. In the alternative, they argue that the amount of damages awarded was excessive.

¶23. Chrestman paid $90,000 for the non-compete clause, and the parties agreed in the purchase agreement that this was the value of the covenant not to compete. The trial court's opinion stated that the award of $90,000 was meant to reimburse Chrestman for what he paid for the non-compete clause since the Mickalowskis wholly failed to comply with its terms; thus, putting Chrestman in as good a position as he would have been in but for the breach. The trial judge based the award on the Mickalowskis's flagrant violations of the covenant not to compete. While it is apparent that Chrestman received little value for the $90,000 he paid for the covenant, the award not only reflects the price paid but also the ongoing and irreparable harm caused by the violations.

¶24. On the issue of punitive damages, the trial court stated in its opinion:

> From a totality of the evidences, it is evident that the Defendants executed the agreement and deliberately engaged in a course of misconduct. The evidence establishes that their wholesale activities were clearly larger in scope than the restricted language of 'from time to time.' They engaged in the above cited sales in total disregard of the contract language requiring notice to the Plaintiff. At the end of the day, this Court is persuaded that the Mickalowskis were upset that the Plaintiff was not purchasing their tile product and deliberately elected to totally disregard the covenant not-to-compete even though the Defendants had been paid $90,000 to refrain from competing against American Flooring.

The award of punitive damages and the amount is within the discretion of the trier of fact. *Sudeen v. Castleberry*, 794 So. 2d 237, 249 (¶34) (Miss. Ct. App. 2001). At the same time, punitive damages are appropriate "only in extreme cases," and should be awarded only with "caution and

within narrow limits." *Id*. (citing *Bryant v. Alpha Entm't Corp*., 508 So. 2d 1094, 1098 (Miss. 1987)). The trial judge demonstrated that this was an extreme case warranting punitive damages in her statement that after executing the agreement the Mickalowskis "deliberately engaged in a course of misconduct" and "elected to totally disregard the covenant not-to-compete." Based on the evidence, the decision of the trial court regarding damages should be affirmed.

¶25. After reviewing the trial court's seventeen page opinion, we find it to be based on the evidence and find that the trial judge made sufficient findings of fact to support her ruling. We find that the trial judge's opinion was based on substantial, credible and reasonable evidence and thus cannot now be disturbed on appeal.

¶26. THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

MYERS, P.J., GRIFFIS, ROBERTS AND CARLTON, JJ., CONCUR. BARNES J., CONCURS IN RESULT ONLY. KING, C.J., DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER AND ISHEE, JJ. IRVING, J., NOT PARTICIPATING.

KING, C.J., DISSENTING IN PART:

¶27. I respectfully disagree with the majority's opinion in three areas: (1) the finding that the Mickalowskis violated the terms of the non-compete agreement in selling wholesale tile to Tupelo Lumber; (2) the finding that the Mickalowskis violated the terms of the non-compete agreement with regard to their wholesale activities outside Lee County but within the restricted area; and (3) the finding that the trial court properly awarded compensatory and punitive damages. Accordingly, I dissent.

Wholesale activities within Lee County

¶28. With regard to the issue of sales that occurred within Lee County, the trial court concluded that the Mickalowskis violated the agreement with regard to their business relationship with Tupelo

Lumber. Specifically, the trial court stated that "the Defendants violated the terms and conditions of Section 6.1.a. dealing with proposed wholesale sales within Lee County when the Defendants failed to notify in writing the Plaintiff regarding the proposed sale to Tupelo Lumber" because a sale to Tupelo Lumber would be in direct competition with Chrestman's store.

¶29. With respect to sales within Lee County, the terms of the non-compete agreement required the Mickalowskis to provide written notice to Chrestman of the opportunity to a right of first refusal on the exclusive right to sell Old World Tile "[b]efore selling any Wholesale Tile to any person or entity inside Lee County, Mississippi. . . ." On June 11, 2001, John Mickalowski sent a letter to Chrestman that stated as follows: "The Purchase and Sale Agreement on Pages12 and 13 Section 6.1.a. Numbers i, ii, and iii states that you have first right of refusal to purchase and carry all lines of ceramic tile carried by Old World Tile, Inc. Old World Tile, Inc. is now offering you first right of refusal for Lee County on the ceramic tile listed on the following page." While that letter, which was introduced into evidence, contained no attached pages, John Mickalowski testified that he sent his entire price list to Mickalowski, both on that date and subsequently, as products and prices changed. Chrestman did not dispute Mickalowski's testimony on this issue.

¶30. The non-compete agreement further states that once Mickalowski provided such written notice, Chrestman had thirty days to respond and exercise its right of first refusal to carry such lines of tile exclusively. If Chrestman failed to respond, "Seller shall be free to sell same to other purchasers in Lee County, Mississippi; provided, however, that if Purchaser later decides that it wants to carry and purchase any such lines of Wholesale Tile in Lee County, Mississippi, Seller agrees to accept no further orders for said Wholesale Tile from the existing purchaser(s) thereof in said county." According to the testimony, Chrestman did not respond to the June 11, 2001, letter within the thirty days set forth in the agreement, nor did he ever approach Old World Tile thereafter.

Accordingly, in order for the account with Tupelo Lumber to violate the agreement, that account would have had to have been established prior to the expiration of the thirty-day period following the June 11, 2001, letter.

¶31. The testimony at trial also demonstrates that Jamie Mickalowski set up the account with Tupelo Lumber more than thirty days from the date of the June 11, 2001, letter. According to the terms of the Purchase Agreement, Jamie Mickalowski agreed to work full-time for Chrestman for one year following the sale of the company. Chrestman purchased the company on July 21, 2000, and both Chrestman and Jamie Mickalowski testified that she fulfilled her obligation to work for Chrestman for one year – until July 21, 2001. Although there was no testimony as to the date of the establishment of the Tupelo Lumber account, Jamie Mickalowski could not have established the account any earlier than July 22, 2001, a date following the expiration of the thirty-day notice period on Chrestman's right of first refusal. Accordingly, there is no substantial evidence to support the trial court's finding that the Mickalowskis violated Section 6.1.a. of the covenant not to compete regarding sales within Lee County.

¶32. The majority finds that the Mickalowskis violated Section 6.1.a because the initial letter and the updated price lists were not sufficient to satisfy the notice requirement. The majority then cites Section 6.1.b. in support of that finding. This interpretation of the Mickalowskis' notice obligations is inconsistent with a plain reading of the contract. Section 6.1.a. defines the Mickalowskis' restrictions for sales within Lee County, while Section 6.1.b. defines the Mickalowskis' restrictions for sales outside Lee County but within the restricted area. The contractual obligations set forth in these two sections are separate and distinct and are clearly defined. To apply the more stringent notice requirements of Section 6.1.b. of the non-compete agreement to the type of sales defined in Section 6.1.a. ignores the most basic concepts of contract law. *See generally A&F Props., LLC v.*

Madison County Bd. of Supervisors, 933 So. 2d 296, 301 (¶12) (Miss. 2006) (outlining basic contract interpretation principles such as the "four corners rule" and a plain reading of clear and unambiguous terms) (citations omitted).

Wholesale activities outside Lee County but within the restricted area

¶33. The non-compete agreement prevented Mickalowski from selling wholesale tile to businesses outside Lee County but within a fifty-mile radius of Chrestman's store in those areas where Chrestman had established a retail presence. Mickalowski was called to testify as an adverse witness and later testified during the presentation of his own case. In that testimony, he admitted to selling wholesale to several businesses that existed outside Lee County but within a fifty-mile radius of Chrestman's store without first providing notice to Chrestman. Mickalowski stated, however, that his price lists served as right of first refusal. Mickalowski further testified that over the course of the five-year non-compete agreement, he sold approximately $350,000 in wholesale tile to those entities.

¶34. Chrestman testified that he advertised throughout most of Northeast Mississippi, which would encompass the fifty-mile radius area, and that approximately half of his business could be attributed to customers within the Northeast Mississippi area. No advertisements or customer records were presented to the trial court as evidence, but Mickalowski did not dispute Chrestman's claims. Mickalowski testified, however, that in order for the restriction to apply, he believed that Chrestman would have been required to open retail locations in each of those areas, as the term "retail presence" referenced a brick-and-mortar building. Counsel for Mickalowski also argued to the trial court that the term "retail presence" required a physical location for the business as a matter of law, while Chrestman's counsel argued that the term "retail presence" was satisfied by proof of advertising to a particular geographic area.

¶35. The trial court determined that the Mickalowskis violated the terms of the non-compete agreement for failure to provide notice of wholesale activities outside of Lee County but within a fifty mile radius "of the Wholesale Territory, in which Purchaser establishes a retail presence." The trial court concluded that Old World Tile's sales to Perry's at Booneville, Earl Owens, Southland, Collier-Windham, Booneville Flea Market, Amanda Aust, Leslie's Floors, and Wren's Carpets all violated this term of the non-compete agreement because, according to the trial court, these sales were made outside Lee County "but within the 50 mile wholesale radius." The trial court also held as a matter of law that the term "retail presence" did not require Chrestman to establish physical locations for his business in order to claim a "retail presence."

¶36. The trial court held as a matter of law that the language of the agreement established that American Flooring did have a retail presence within fifty miles of its location at the time of the sale in July 2000. The trial court also found that Chrestman's testimony that he advertised within the restricted area and drew 50% of his customer base from the restricted area, as well as John Mickalowski's admission that he did not provide notice of any of the proposed sales within the restricted area, provided substantial evidence for the trial court to conclude that the Mickalowskis violated that provision of the covenant not to compete.

¶37. The terms of the agreement between the parties do not define the phrase "retail presence," and a nationwide search of case law revealed no cases defining the term "retail presence." Counsel for Mickalowski presented internet news clippings, mostly regarding cellular companies, which inferred that the term "retail presence" meant a physical location. Chrestman's counsel argued that to require a physical location within each county in the Northeast Mississippi area would be unfeasible and would result in an absurd reading of the contract.

¶38. I agree with the trial court that under the terms of this contract, the phrase "retail presence" does not require a brick-and-mortar building in each county in which Chrestman claimed a retail presence. Chrestman testified that he advertised in the fifty-mile radius surrounding his physical location and that fifty percent of his customer base came from outside Lee County. While I would have preferred documentary proof of such advertisement, in the form of a Yellow Pages advertisement or newspaper ads or invoices from other advertising outlets, I have to concur with the majority that Chrestman's testimony, which was undisputed, does constitute substantial evidence that Chrestman had established a "retail presence" in those areas outside Lee County in which Old World Tile contracted its wholesale business.

¶39. I disagree with the majority's holding, however, that the trial court correctly interpreted the contract to find that Chrestman had established a "retail presence" in July 2000 when he purchased the business from the Mickalowskis. Interpretation of the terms of a contract is an issue of law subject to *de novo* review by this Court. *See IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 108 (¶50) (Miss. 1998). The covenant not to compete reads in pertinent part as follows:

> Purchaser shall have the exclusive right of first refusal, in its sole discretion, to carry for retail sale and to purchase from Seller any and all lines of the Wholesale Tile in any area outside of Lee County, Mississippi but within the remainder of the Wholesale Territory [the fifty-mile radius from the current location of the business], *in which Purchaser establishes a retail presence.*

(emphasis added). The phrase "in which the Purchaser establishes a retail presence" indicates that at the time of the agreement, Chrestman had not yet established a retail presence but that he intended to do so. Accordingly, in order for Mickalowski to provide notice of proposed sales in those areas in which Chrestman had established a "retail presence," Chrestman was required to first give Mickalowski notice that he had, in fact, established a retail presence in those areas. The evidence in the record does not establish that Chrestman ever communicated to Mickalowski that he had

established a retail presence in any area outside of Lee County; therefore, Mickalowski could not have known to provide Chrestman with notice of proposed sales.

¶40. Section 6.1.b, regarding sales outside of Lee County, does require Mickalowski to give notice of each proposed sale of tile, but only after a condition precedent is met. Before Mickalowski can be said to have an obligation to notify Chrestman, Chrestman must first establish a retail presence in that area. Because Chrestman had not engaged in retail tile sales prior to the date of the contract, the contract cannot be interpreted to mean that Chrestman already had a "retail presence" in the fifty-mile radius outside Lee County. If the term "retail presence" does not mean a separate physical location, then of necessity, some notice to Mickalowski of Chrestman's claims of a "retail presence" in the restricted area must be given in order for Mickalowski to know that he had this obligation under the contract.

¶41. Only the actual establishment of a retail presence triggered the obligation of notice and the right of first refusal under the contract. Chrestman testified that he spent advertising dollars in the restricted area and that approximately half of his sales came from the restricted area outside Lee County. Chrestman's statements were the sum of the testimony on the establishment of a retail presence outside Lee County. As a practical matter, I cannot conclude that Mickalowski, as a resident of Lee County and a stranger to Chrestman's business practices, had knowledge of Chrestman's retail presence based on Chrestman's evidence. Accordingly, without some notice from Chrestman or some proof that Mickalowski had actual knowledge of Chrestman's retail presence, it is illogical to conclude that Chrestman met the condition precedent contained in Section 6.1.b. and that Mickalowski's failure to give notice constituted a violation of the non-compete agreement.

¶42. The majority further interprets Mickalowski's testimony to mean that Mickalowski admitted that his failure to provide notice of those sales was an admission that he had violated the agreement.

Counsel for Chrestman elicited testimony from Mickalowski during Chrestman's case-in-chief in which Mickalowski admitted that he did not provide notice of sales within the restricted area. Mickalowski also admitted that Chrestman had some rights to notice under the terms of the contract. Mickalowski's testimony as a whole, however, demonstrates that Mickalowski did not provide notice to Chrestman of those sales outside Lee County because he did not believe that Chrestman had a retail presence outside Lee County. Mickalowski testified that he interpreted the phrase "retail presence" to mean a store, an actual physical location. While the trial court ultimately determined that "retail presence" is not defined under the terms of this contract as a brick-and-mortar building, such an interpretation does not automatically lead to a conclusion that Mickalowski violated the terms of the non-compete. Only the completion of the condition precedent, the actual establishment of a "retail presence," triggered Mickalowski's obligation to provide notice.

Damages

¶43. Mickalowski also appeals the trial court's decision to award $90,000 in compensatory damages, $25,000 in punitive damages, and $17,871.42 in attorney's fees. Mickalowski argues that the evidence does not support these damage awards. In reviewing the award of damages, I recognize that "it is primarily the province of the jury [and in a bench trial the judge] to determine the amount of damages to be awarded and the award will normally not 'be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.'" *Lewis v. Hiatt*, 683 So. 2d 937, 941 (Miss. 1996).

¶44. The parties agreed in the Purchase Agreement that the five-year covenant not to compete had a value of $90,000. The $90,000 award for compensatory damages reflects the trial court's conclusion that Chrestman received absolutely no value for the covenant not to compete, although the trial court does not state her reasoning for the award. Based on the evidence received at trial, I

find that the trial court's conclusion was not based on the evidence and is unreasonable. Accordingly, I would remand the case for the trial court to re-evaluate the amount of damages to be awarded. Based on my analysis on the issues of violation of the non-compete, cf necessity, the trial court would be required to re-evaluate the award of punitive damages as well.

¶45. The majority does not address the issue of attorney's fees but upholds the award. I agree with the trial court's decision to award attorney's fees, but because the majority failed to address this issue in its opinion, it is unclear why the majority upholds that award; therefore, I write to explain my support of the trial court's decision. Mississippi law states that attorney's fees may be awarded only in the following instances: when a contract or statute so provides or when an award of punitive damages is proper. *See Hamilton v. Hopkins*, 834 So. 2d 695, 700 (¶16) (Miss. 2003). The Purchase Agreement explicitly provides in Section 6.6 that "[i]n the event that either party elects to incur legal expenses to enforce or interpret any provision of this Agreement, the prevailing party will be entitled to recover such legal expenses, including, without limitation, reasonable attorneys' fees, costs and necessary disbursements, in addition to any other relief to which such part shall be entitled." Accordingly, an award of attorney's fees to Chrestman, as the prevailing party, was proper so long as that award was reasonable. I agree with the trial court that the award of $17,871.42 in attorney's fees is not unreasonable; therefore, I would not disturb the trial court's award of attorney's fees.

Conclusion

¶46. I disagree that Chrestman presented substantial evidence that the Mickalowskis failed to provide the required notice to Chrestman with regard to wholesale activities within Lee County. I also disagree that the evidence was sufficient to prove that the Mickalowskis failed to provide the required notice of wholesale activities outside Lee County but within the restricted area. The obligations of that provision of the non-compete were not triggered without notice from Chrestman

that he had established a "retail presence" in that area, and while Chrestman presented evidence that he had established a "retail presence" through the use of advertising and gave testimony regarding his sales in that restricted area, there is no evidence that Mickalowski was aware of Chrestman's "retail presence." The signing of the non-compete, by itself, is not sufficient notice to Mickalowski that Chrestman established a "retail presence." To the contrary, the plain language of the contract identifies Chrestman's "retail presence" as a condition precedent not yet established. Finally, I disagree with the trial court's decision to award the entire value of the non-compete agreement as compensatory damages and to award punitive damages. The evidence does not establish that Chrestman received no value from the non-compete agreement, nor is it clear that the award of punitive damages was proper. For the foregoing reasons, I respectfully dissent.

CHANDLER AND ISHEE, JJ., JOIN THIS OPINION.