IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 9

GARY HARDY, et al.,	)	
	)	
Plaintiffs/Counterclaim Defendants,	)	
	)	
vs.	)	Case No. 09-C-138
	)	*Pursuant to K.S.A. Chapter 60*
BME, INC., et al.,	)	
	)	
Defendants/Counterclaim Plaintiffs.	)	
	)	

MEMORANDUM DECISION AND ORDER

Now on this 3rd day of October 2012, this matter comes on for decision. This case was tried to the Court over a three-day period. At the close of the evidence, the Court took the matter under advisement and the parties have submitted proposed findings of fact and conclusions of law. The Court finds in favor of plaintiffs on their claim against defendants and against defendants on their counterclaims against as more fully set out below.

NATURE OF THE CASE

The genesis of this lawsuit was the sale of plaintiff's Gary Hardy Dodge, Inc. (GHD or Hardy) to defendant BME, Inc. (BME). The sale was consummated in 2003 and the assets of GHD were transferred to BME. A consulting agreement was executed wherein plaintiff was to provide consulting services to BME for a substantial consideration. The agreement also contained a non-compete clause relating to plaintiff not hiring away certain of his old employees who went with BME for plaintiff's other car dealership in Holton, KS. Both parties claim the other breached the terms of the agreement, plaintiff claiming that BME failed to pay him all of

the consulting agreement payments and BME claiming it suffered substantial damages due to the hiring away of old employees who went back to plaintiff at his dealership in Holton, KS, thus justify BME in unilaterally suspending remaining payments due plaintiff under the original consulting agreement. Plaintiff Hardy claims he is entitled to $997,500, plus interest representing the remaining payments due and payable under the Consulting Agreement. At trial the Briggs Defendants do not dispute Plaintiff's claim or the amount owed under the Consulting Agreement, but contend their counterclaims should be set off against the amount owed Hardy.

ISSUES PRESENTED

A. Defendant BME does not dispute that it breached the consulting agreement and concedes it owes the amount claimed by Hardy, that is $997,500 plus interest.

B. This being the case, it is probably a non-issue to whether BME owes the remainder of its contractual obligation to Hardy. Counsel discuss this issue in some detail such as whether or not Hardy materially breached the agreement in terms of the non-hiring provision, and whether or not Hardy owed a fiduciary duty to BME. The Court will discuss these issues since it is necessary, in the Court's opinion, to at least provide a background of the facts of the case, set a framework for this opinion and add some measure of clarity to the reader as to the facts of the case and the analysis by the Court.

C. The critical issues remaining in this case are:

1. Did BME waive its right to damages by continuing to pay Hardy under the Consulting Agreement? Did Hardy fail to assert waiver, an affirmative defense, in his answer?

2. Did Hardy materially breach the non-hire provisions of the agreement and did it cause lost profit damages to BME as a result?

3. Did BME provide sufficient, credible, non-speculative proof of damages through its expert witnesses to support its claim for lost profit damages?

4. If the answer to subparagraph 3 is "yes", does equitable setoff apply in this case?

FINDINGS OF FACT

1. In 2000, Plaintiff Gary Hardy opened an automobile dealership in Holton, Kansas that was operated by and through Gary Hardy Chrysler Dodge Jeep, Inc. ("GHCDJ".)

2. Prior to March 2003, Gary Hardy Dodge, Inc. ("GHD") was an automobile dealership with its principal place of business located in Topeka, Kansas. In December 2004, GHD and GHCDJ merged, whereby GHD thereafter ceased to exist and GHCDJ was the surviving corporation.

3. BME, Inc. is a Kansas corporation, doing business as Briggs Dodge, with its principal place of business in Topeka, Kansas. Defendants Russell K. Briggs, Ilene Briggs, Dwayne Miller, and Shirley Miller each have an ownership interest in BME, Inc.

4. Prior to March 2003, Russell Briggs and Gary Hardy met various times to discuss the sale of GHD to BME, Inc. As a result, on May 8, 2003, BME, Inc. entered into a Consulting Agreement with Gary Hardy, as an individual, under which Gary Hardy was to advise BME, Inc. on "past practices, customers, strategies, acquisitions candidates, and generally represent [BME, Inc.], or any of its subsidiaries or affiliates (collectively "Briggs Group")."

5. The Consulting Agreement provided that BME, Inc. would pay to Gary Hardy the sum of Twenty-One Thousand Dollars ($21,000) for the first sixty (60) months of the agreement. Commencing on or about August 2008 the payments would increase to Fifty-Two Thousand Five Hundred Dollars ($52,500) per month for the next twenty-four (24) months.

6. On May 8, 2003, Defendants Russell Briggs, Ilene Briggs, Dwayne Miller, and Shirley Miller, ("Guarantors") executed a Personal Guarantee to Gary Hardy which essentially provided

that they, as individually, and jointly, severally, personally and unconditionally guaranteed to Hardy payment in full of all obligations in the Consulting Agreement that might be due Hardy.

7. The Consulting Agreement contains the following language regarding a fiduciary duty owed by Hardy to BME:

> [Gary Hardy] acknowledges and agrees that [Gary Hardy] owes a fiduciary duty of loyalty, fidelity and allegiance to act at all times in the best interest of [BME, Inc.] and Briggs Group to do no act which would injure the business, interests, or reputation of them. In keeping with these duties, [Gary Hardy] shall make full disclosure to [BME, Inc.] and Briggs Group of all business opportunities pertaining to the business of [BME, Inc.] and Briggs Group in Topeka, Kansas, and shall not appropriate for [Gary Hardy's] own benefit opportunities concerning the subject matter of the fiduciary relationship.

8. The Consulting Agreement and the Asset Purchase Agreement contained the following language titled "Non-Hiring Obligations":

> As part of the consideration for this Agreement, [Gary Hardy] and [BME, Inc.] agree to the non-hiring provisions of this Section 8. [Gary Hardy] agrees that during (sic) for a period of five (5) years after the Closing Date, [Gary Hardy] will not, directly or indirectly for themselves or for others, proselytize, offer employment, retain, hire or assist in the proselytizing, recruitment or hiring of any employee of [BME, Inc.]. Notwithstanding anything to the contrary, any employee which has not worked for [BME, Inc.] for a period of four (4) months may be hired by [Gary Hardy].

9. On August 4, 2003, Gary Hardy Dodge, Inc., as seller, and BME, Inc., as purchaser, executed a Closing Memorandum transferring the assets of Gary Hardy Dodge, Inc. to BME, Inc.

10. At the time BME, Inc. took possession of the assets in August 2003, it also hired most employees of Gary Hardy Dodge, Inc.

11. BME, Inc. claims that it suffered damages as a result of four employees leaving BME, Inc. for GHCDJ, in violation of the non-hire obligation. The four employees in question were: Gary Boyle, Shawn "Toby" Brown, Todd Brown, and Michael Lake.

12. Gary Boyle was Parts Manager at BME, Inc., until he resigned on April 5, 2005. He was then hired by GHCDJ as Parts Manager on May 4, 2005. Boyle was not a sales person.

13. Shawn "Toby" Brown was the Used Car Manager at BME, Inc. until he resigned on May 14, 2004. He was hired by GHCDJ as Sales Manager on July 5, 2004. He worked at GHCDJ for less than two years. The Browns experienced lessening sales at BME before they moved on to GHCDJ.

14. Todd Brown was a part-time Used Car Sales Representative at BME, Inc. until he resigned on May 14, 2005. He was then hired by GHCDJ as a part-time Sales Representative on July 5, 2004. Like his brother, Todd Brown worked for GHCDJ for less than two years.

15. Mike Lake was Finance & Insurance Manager at BME, Inc. until he left on February 29, 2004. He was then hired by GHCDJ as Finance & Insurance Manager "within a couple of days" of leaving BME, Inc. Like Boyle, Lake was not a sales person. Lake was employed by GHCDJ for only three days.

16. Russell Briggs testified that he knew that Hardy solicited BME employees for employment in the fall of 2008, so BME, Inc. stopped paying Gary Hardy for the dealership in January 2009. Russell Briggs did not call Hardy and ask him about the alleged solicitation before making the decision to stop payments.

17. The remaining payments under the Consulting Agreement total Nine Hundred Ninety-Seven Thousand Five Hundred Dollars ($997,500), which is calculated as nineteen (19) months worth of $52,500 payments.

18. To determine damages sustained by Briggs Dodge, Briggs retained the expert services of economist David Macpherson, PhD. On July 15, 2011, David Macpherson issued his Analysis of Economic Damages at BME, Inc. and determined that Briggs Dodge had incurred damages.

29. Through his analysis, David Macpherson determined that based upon Gary Hardy's alleged violative misconduct, Briggs Dodge suffered calculated losses of between $1,449,374 to $2,339,570.

ANALYSIS AND CONCLUSIONS

1. Breach of Non-Hiring Provisions. Hardy did breach the non-hiring provisions when Gary Boyle, Toby Brown, Todd Brown and Mike Lake were hired, but while the breach was worthy of attention, it does not rise to the level of a material breach due the reasons set forth in the balance of this opinion regarding the facts pertinent to the hirings and the failure of proof of damages which is discussed below.

a. A breach of contract is material if the "promisee receives something substantially less or different from that for which he bargained for." *Almena State Bank v. Enfield*, 24 Kan. App. 2d 834, 838, 954 P.2d 724 (1998). As noted in *Almena*, BME must receive substantially less than they bargained for to qualify as a material breach. BME argues that the non-hire provisions of the Consulting Agreement and the Asset Purchase Agreement were essential to the contracts. The evidence concerning the importance of the non-hire provision is conflicted. Hardy remembers conversations about the non-hire, but Briggs does not.

b. Regardless of the importance of the non-hire provisions during negotiations, the Court finds that the primary goal of the Consulting Agreement was to transfer the dealership to BME. Meetings took place between Hardy and Briggs which resulted in the sale of the

dealership to Briggs through a Consulting Agreement and an Asset Purchase Agreement. The essence of the Consulting Agreement was for Briggs to pay Hardy for the dealership over an extended period of time, without having to obtain a loan from a bank. Even though the Consulting Agreement included language requiring Hardy to act on behalf of BME if requested, this duty was never enforced. Thus, the Court finds that the primary purpose of the Consulting Agreement was not for consulting, but for financial purposes.

2. Fiduciary Relationship. Hardy did have a fiduciary relationship with BME, but did not materially breach the relationship.

a. When a fiduciary relationship exists between two parties, it is the duty of the person in whom confidence was placed to act with the utmost good faith and loyalty for the furtherance and advancement of the interests of his or her principal. *Jeanes v. Bank of America, N.A.*, 40 Kan. App. 2d 281, 301, 191 P.3d 325 (2008).

b. Here, the Consulting Agreement created a contractual fiduciary duty between Hardy and BME. The Agreement states that Hardy owes "a fiduciary duty of loyalty, fidelity and allegiance to act at all times in the best interest of BME, and to not act in a way which would injure BME." Hardy breached the fiduciary duty when the employees were hired at GHCDJ. The hiring of BME employees in violation of the Agreement does not further and advance the interests of BME. However, the purpose of the Consulting Agreement was not to use Hardy as a consultant, but to purchase GHD. Further, Hardy was never used as a consultant and performed his duty to be available if needed. Even though there was a technical breach of the fiduciary duty when the breach occurred, it does not rise to the level of a material breach.

c. Although BME likely waived its right to damages by continuing to make

payments for a time after the breach, Hardy did not assert waiver as an affirmative defense. Once it has been established that a contractual right has been waived, a party possessing the contractual right is precluded from asserting it in a court of law." *Zenda Grain & Supply Co. v. Farmland Industries., Inc.*, 20 Kan. App. 2d 728, 746, 894 P.2d 881 (1995).

d. There is a limited exception that allows new issues to be raised by evidence to which there is no objection. *Lehigh, Inc. v. Stevens*, 205 Kan. 103, 109, 468 P.2d 177 (1970). Waiver was never mentioned until Hardy submitted his Proposed Findings of Fact and Conclusions of Law. For Hardy to be able to assert this defense late he would have needed to present it to the Court without BME objecting to Hardy's assertion of the defense. Since the first assertion of waiver was in the Proposed Findings of Fact and Conclusions of Law, the Court is disallowing Hardy's assertions of waiver.

e. Everything else aside, The Briggs Defendants do not dispute the Plaintiff's claim nor the amount owed under the Consulting Agreement. BME clearly and materially breached the contract by failing to make the payments, and Hardy is entitled to an award for damages, plus prejudgment interest.

f. Per the agreement, BME is required to pay Hardy $21,000 per month, for 60 months, followed by $52,500, per month for 24 months. BME paid all of the $21,000 payments, but only five of the $52,000 payments. Creditors are allowed interest at the rate of ten percent per annum, when no other rate of interest is agreed upon, for any money after it becomes due, from the day of liquidating the account and ascertaining the balance. K.S.A. 16-201. Prejudgment interest is only allowable on liquated claims. *Edward Kraemer & Sons, Inc. v. City of Overland Park*, 19 Kan. App. 2d 1087, 1096, 880 P.2d 789 (1994). Here, since both the

amount due and the date is fixed and certain or easily ascertainable, the Court will allow prejudgment interest at the 10 percent rate.

3. BME's Counterclaim. The Court finds that BME is not entitled to damages for its counterclaim of lost profits due to the hiring of several BME employees who were ex-employees of Hardy within the period barred by the consulting agreement and asset purchase agreement. These individuals were Gary Boyle, Shawn "Toby" Brown, Todd Brown, and Michael Lake. As noted previously, Briggs retained the expert services of economist David Macpherson, Ph.D. who issued his Analysis of Economic Damages at BME, Inc. and determined that Briggs Dodge had incurred damages of between $1,449,374 to $2,339,570.

a. As a preface, the Court reiterates that it found above that plaintiff did in fact breach the non-hire agreement. Further, the Court finds that any breach physically committed by other employees of plaintiff is attributable to plaintiff, either by direct or imputed knowledge and ratification.

b. The Court, as fact finder, has carefully reviewed its trial notes, the exhibits, and testimony presented at trial on this question, as well as re-reading the trial transcript of the actual testimony. The Court is simply not comfortable with and finds troublesome the analysis performed and provided by defendants' expert, economist David Macpherson, PhD. based on the facts at hand.

c. The Court sees two questions of critical importance: (1) did BME prove that plaintiff's actions were the proximate cause of BME's alleged damages; and (2) is the expert testimony provided by BME grounded in solid analysis and conclusions and not subject to speculation and supposition? These questions are interrelated. The Court cannot answer these

factual considerations in the affirmative with any degree of confidence or conviction.

d. In the first place, in order for BME to recover on its counterclaim, it must show that GHCDJ's hiring of four former employees of Gary Hardy Dodge who remained with BME and worked for varying periods of time at BME before moving on to GHCDJ is definitively linked and caused BME to lose customers and used car sales in the amounts hypothesized by BME's expert. In other words, has proximate cause for damages been established with some degree of acceptable reliability for the fact finder? The Court cannot find that such has been demonstrated by BME's testimony and the facts surrounding this case.

(1) For example, there was testimony that the economy between Manhattan and Topeka was different is some respects due to "the closing of Fort Riley"; that BME's sales strategies were different than Gary Hardy Dodge; that the Brown brothers were experiencing decreased sales at BME before they moved on; that employees Lake and Boyle were not even sales people, and that Briggs had become less involved with the business due to personal medical issues. Further, the used car inventory was not as good at BME as Gary Hardy Dodge had had; and there was evidence that GHCDJ's successful sales were the result of manufacturer's incentives and selling many new Dodge Neons to people employed at a casino near Holton. The Browns had specialized in selling trucks at BME and used vehicles, not new Neons.

(2) Of further concern is the fact that, according to BME's expert, there is a 3½ year cycle, on average, of when people purchase or trade for different vehicles. The testimony showed that the Browns were only employed by BME for about nine months, Lake for only six months and Boyle for 8 months. The Browns worked at GHCDJ for less than two years,

while Boyle worked for about four years. Lake worked at GHCDJ for only three days. Taking into account the 3½ year typical buying cycle, it appears to the Court that any customers of BME who may have purchased vehicles from GHCDJ on account of these four employees thus causing damages to BME is slight. It is very difficult to factually accept the proposition that these four employees could cause $1.9 to $2.3 million lost profits. When one considers that around 87% of BME's employees who worked there between 2003 to 2009 are no longer employed at BME, it becomes even more difficult to believe that the four employees mentioned above caused the losses claimed by moving on to GHCDJ, and if such were indeed the case, it is surprising that BME is still in business.

e. The next question of concern, as noted above, involves whether or not the amount of damages claimed by BME is too speculative. The Court finds that such is indeed the case.

(1) In analyzing this issue the Court is not unmindful of the general rule that a fact finder cannot disregard uncontroverted and unimpeached testimony or the only evidence upon a material question in controversy and return a verdict in direct opposition. See *Wellborn v. Stockman*, 10 Kan.App.2d 597 (1985) and *Briscoe v. Ehrlich*, 9 Kan.App.2d 191, 192 (1984). This rule, however, does not require the fact finder to blindly accept an expert opinion or the fact that the other side did not put on its own expert to controvert the expert's conclusions. The key is the presence of unimpeached and reliable, competent evidence presented by the expert and the absence of other evidence that calls the expert's conclusions into question. Such matters are fact questions and ultimately go to weight and credibility.

(2) Defendants cite a well reasoned Nebraska case similar to the case at bar – *Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 281 Neb. 281, 799 N.W. 2d, 249 (2011). Among other things, the Nebraska Supreme Court notes that damages are to be established with reasonable certainty, and that if sufficient evidence clearly shows that a loss of profits was suffered, it is a jury's or fact finder's province to determine the loss from the best evidence available given the nature of the facts of the case.

(3) Keeping that in mind, in having reservations and doubts about the reliability of the expert's testimony and the method used as a base upon which to draw his conclusions and opinions, this Court does not set itself up as a kind of "super expert" free to reject the offered expert's opinion at will. As noted in *Gary's Implement*, recovery for loss of profits depends upon the facts and circumstances of each particular case and the expert must furnish calculations based upon the best available proof and reasonably accurate data. The Nebraska court uses the term "reasonable certainty" of damages. This Court believes such is the proper standard.

(4) Here, BME's expert, David Macpherson, provides a calculation of damages based on comparisons to Briggs Auto Group and Briggs Motor Company, both in Manhattan, KS. These benchmarks are compared with used car revenue at BME, located in Topeka. His calculations only focus on the lost profits associated with the loss of personnel in the used vehicle department of BME.

(5) While Macpherson compared the two markets in his damage calculations, he did note that the economy was worse in Manhattan, as compared to Topeka,

which causes the Court, as fact finder, to speculate that such a circumstance might very well throw off the calculations of the purported loss in Topeka.

(6) The report also includes a statement that the breach resulted in the loss of customers. However, Macpherson does not include any information stating how many customers were lost, how much BME lost as a result, and why the customers left BME. Also, the report does not include profits of each business wholly. If a business as a whole is suffering, it suggests that used car profits may not be entirely attributed to the loss of employees.

(7) Further, Macpherson did not consider other factors that may have an impact on BME's lost profits. Macpherson testified that he did not consider employee performance, the difference in management techniques, Briggs' inability to manage while injured, and the effect of other staff leaving. Other variables that could have an effect on lost profits are: the difference in inventory, the Topeka market, and the establishment of a new store. The Court is left with more questions than answers, rather than having a firm grasp on the certainty of damages

(8) Although Macpherson's damage calculation is tenable and clear, the Court does not find it compelling given the facts and circumstances surrounding this case. It fails to consider many variables that would allow the Court to accept damages with reasonable certainty. It is clear that BME did fail to do as well as other Briggs stores, but the Court does not find with reasonable certainty that Hardy is to blame. Without more reliable evidence that customers did not want to purchase vehicles from BME because of the loss of the four employees, BME has failed to prove damages. In *Great Pines Water Co. v. Liqui-Box Corp.*, 203 F.3d 920 (5th Cir. 2000), the court vacated a two million dollar judgment on the ground that

plaintiff had not proven its lost profits with reasonable certainty. Plaintiff's senior management testified as to large numbers of customers lost because of defective products supplied by defendant. But because plaintiff failed to introduce documentary evidence indicating the actual number of cancellations attributable to defendant's products, the court held that lost profits had not been proven with reasonable certainty. See id. at 923.

(9) Here, though BME's expert testified that obtaining such data would have been too difficult, the evidence is that dealerships are required to file monthly sale reports with the Kansas Department of Revenue. BME and GHCDJ's department of revenue records contained monthly sales reports which identified customers. The Court finds that such customer information was thus attainable and would be a reliable source from which one could obtain data to determine whether BME lost used car sales from its customers later purchasing vehicles at GHCDJ.

(10) As the Nebraska court noted in *Gary's Implement*, the expert's report and the particular circumstances surrounding the matter are admissible, but they are matters for the jury's determination as to weight and credit.

ORDERS OF THE COURT

A. Plaintiffs Gary Hardy, and individual and Gary Hardy Chrysler Dodge Jeep, Inc., f/k/a Gary Hardy Dodge, Inc. are hereby granted judgment against BME, Inc., Russell K. Briggs, Ilene Briggs, Dwayne Miller, and Shirley Miller, jointly and severally in the amount of $1,246,493.48, representing $997,500.00 for missed payments, and $248,993.84 in prejudgment interest up to and including the date of oral arguments, March 30, 2012. In fairness to the defendants, the Court is cutting off prejudgment interest as of the above date. The judgment shall

bear interest at the judgment rate from the date of filing of this opinion until paid in full.

B. Defendants' counterclaim is denied and plaintiffs are granted judgment thereon.

C. Costs are assessed to defendants.

D. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

IT IS BY THE COURT SO ORDERED.

Hon. John E. Sanders
Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in pick-up bin this 3rd day of October, 2012, to the following:

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