UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1611

September Term, 2015

AMP SYSTEMS, LLC, ET AL.

v.

AERTIGHT SYSTEMS, INC.

Kehoe,
Reed,
Beachley,

JJ.

Opinion by Reed, J.

Filed: December 5, 2016

This case originated in the Circuit Court for Anne Arundel County, where the appellee, Aertight Systems, Inc. ("Aertight"), alleged breach of contract and breach of the duty of loyalty against two of its former employees, Adam Albers and Scott Lang,[1] as well as tortious interference with contract, civil conspiracy, and unfair competition against Albers, Lang, and their new employer, AMP Systems, LLC ("AMP"). At the conclusion of a jury trial, a verdict was returned against Albers, Lang, and AMP (sometimes collectively referred to as "the appellants") on all counts alleged. The jury also awarded Aertight with lost profit damages in the amount of $30,000.

On appeal, the appellants present four questions for our review, the first, second, and third of which we rephrase:[2]

[1] Scott Lang is a Hungarian immigrant who legally changed his name from Gabor Boldog after becoming an American citizen. In naming him as a defendant on the front page of its Complaint, Aertight referred to him as "Gabor 'Scott' Boldog."

[2] The first three questions presented by the appellant are as follows:

> I. Did the circuit court err in its decision to allow the jury to consider whether appellants Albers and Lang violated the non-solicitation clause of their employment agreements when there was no evidence to support that finding?
>
> II. Absent evidence that the appellants Lang and Albers violated the non-solicitation clause of their employment agreements, did the circuit court err when it instructed the jury on breach of duty of loyalty, tortious interference with contract, civil conspiracy and unfair competition?
>
> III. Did the circuit court err when it allowed the jury to consider damages incurred by appellee Aertight regarding customers for whom no evidence was presented?

I. Did the circuit court err where it denied the appellants' Motion for Summary Judgment as to all counts on the ground that it violated the scheduling order?

II. Did the circuit court err where it denied the appellants' motions for judgment on the evidence as to all counts?

III. Did the circuit court err where it accepted the jury's award of $30,000 in lost profit damages to Aertight?

IV. Did the circuit court err when it submitted a verdict form that did not require the jury to reach separate determinations for each defendant on the causes of action at issue?

For the following reasons, we answer the first question in the negative and the second question in the affirmative. Therefore, we need not reach the merits of the third and fourth questions and shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2004, lifelong friends Gordon Triplett and Andrei Palmer founded Aertight. According to its website, Aertight provides "IT Service and Network Support, as well as Critical Power Services to businesses and government agencies throughout the Baltimore/Washington DC Metro areas." *About*, AERTIGHT SYSTEMS, INC., https://www.aertight.com/about (last visited Oct. 5, 2016).

On December 17, 2007, Adam Albers joined the Aertight team. During the course of his employment with Aertight, he held the positions of Systems Administrator and, most recently, Operations Manager. Approximately two years after Albers' hiring, on November 30, 2009, Scott Lang was brought on board to serve as Aertight's Technical

Manager. By all accounts, Albers and Lang, along with Palmer, were the company's top technicians.

In April 2014, Palmer called a meeting of Aertight's Board of Directors. At that time, the Board consisted of Triplett (President, Treasurer, and Director), Palmer (Vice-President and Director), Triplett's aunt and uncle, and Palmer's father. The parties to this appeal disagree as to the nature of the Board meeting.[3] However, the result of the meeting is inarguable: On April 14, 2014, Triplett terminated Palmer's employment at Aertight.

Immediately following Palmer's termination, Triplett called a staff meeting to inform all Aertight personnel of what had transpired. During that meeting, upon hearing of Palmer's departure, both Albers and Lang resigned from their positions, effective immediately. In doing so, they returned their company-issued cell phones, but not before performing "factory resets."

On April 17, 2014, three days after being terminated from Aertight, Palmer founded AMP Systems, LLC. According to its Articles of Organization, AMP's business purpose was to "provide consulting services for computers and computer systems." In other words, Palmer established AMP to be a competitor of Aertight. He was free to do this, however, as he was not subject to any restrictive covenants with Aertight.

[3] Aertight contends that "[a]t this meeting, Mr. Palmer claimed that Mr. Triplett was taking actions, including the creation of a new incentive compensation, which would result in Mr. Albers and Mr. Lang terminating their employment." "In other words," according to Aertight, "Mr. Palmer wanted to run Aertight." The appellants, however, assert that "Mr. Palmer developed concerns about Mr. Triplett's mental stability, and met with Aertight's Advisory Board of Directors, which was populated by their family members, in an effort to seek an intervention and get help for Mr. Triplett."

Days after the creation of AMP, Palmer offered Albers and Lang employment with the new company, and they both accepted. Palmer testified that prior to his departure from Aertight, he had no plans of starting a competing company, much less any conversations with Albers or Lang about outside business endeavors. Unlike Palmer, both Albers and Lang had employment contracts with Aertight containing the following non-solicitation clause:

> I agree that during the period of my employment by the Company I will not, without the Company's prior written consent, engage in any employment or business activity other than for the Company. I further agree that during the term of my employment with the Company and for a period of two (2) years thereafter, I also shall not solicit, or arrange to have any other person or entity solicit, any person or entity engaged by the Company as an employee, customer, supplier, or consultant or advisor to the Company to terminate such party's relationship with the Company. The time periods provided for in this section 8.1(a) shall be extended for a period of time equal to any period of time in which I shall be in violation of any provision of this Section 8.

(Emphasis added). Under their employment contracts, both Albers and Lang were free to work for a competitor of Aertight as soon as their employment with the company had come to an end.

On May 6, 2014, as mentioned above, Aertight filed a Complaint in the Circuit Court for Anne Arundel County alleging breach of contract and breach of the duty of loyalty against Albers and Lang, as well as tortious interference with contract, civil conspiracy, and unfair competition against Albers, Lang, and AMP. At that time, Aertight was aware of 4 customers that had previously been serviced by Albers and/or Lang that

were making the switch over to AMP. By the close of discovery, there were a total of 20 such customers that had made the switch.

A jury trial was held on September 1-3, 2015. At the beginning of the trial, the court denied the appellants' Motion for Summary Judgment, which was filed on July 22, 2015, over six months after the scheduling order's January 18, 2015, deadline for dispositive motions.

At the close of Aertight's case, and again at the close of the case itself, the appellants renewed their Motion for Summary Judgment and moved for judgment on the evidence. The court neither granted nor denied the motion for judgment initially. Instead, it reserved its ruling and allowed the case to proceed to the jury. Ultimately, the jury returned a verdict against the appellants and awarded Aertight $30,000 in lost profit damages, plus attorneys' fees. The appellants subsequently made a motion for a mistrial, which the court denied. In a post-trial hearing, the court overturned the award of attorneys' fees, but otherwise entered final judgment in accordance with the jury's recommendations.

On September 29, 2015, the appellants filed a timely notice of appeal.

DISCUSSION

I. Denial of Motion for Summary Judgment

A. Parties' Contentions

The appellants argue that the circuit court erred in denying their Motion for Summary Judgment. Citing *Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, 56 F. App'x 108 (4th Cir. 2003), they assert that "[u]nder Maryland law, an employee's non-solicitation

covenant is limited to the initiation of customer contact." Thus, because there is no evidence that Albers or Lang initiated contact with any of Aertight's customers after they became employed by AMP, the appellants contend that "[t]here was no improper solicitation as a matter of law."

The appellants further argue that there is no evidence that Albers or Lang "caused or encouraged Mr. Palmer to solicit Aertight customers" on their behalf. Finally, the appellants assert that to suggest that "the speed with which Mr. Palmer formed AMP, Mr. Albers' and Mr. Lang's resignation from Aertight and subsequent hiring by AMP, and Mr. Palmer's ability to quickly and efficiently lure customers away from Aertight . . . [amount to] a 'conspiracy to solicit'" is nothing more than "speculation" and "conjecture."

Aertight does not respond substantively with respect to the Motion for Summary Judgment. Instead, it argues that the court did not abuse its discretion where it denied a motion that was filed "over six months after the deadline for dispositive motions set by the trial court, over four months after the pre-trial conference and was contrary to the Pre-Trial Order signed by both parties indicating that there were no pending motions and that the case was ready to be tried." Additionally, Aertight argues that it would have been prejudiced if it had to substantively respond to a motion for summary judgment with less than a month to go before trial.

B. Standard of Review

In the initial stages of the trial on September 1, 2015, after hearing argument from counsel for both sides, the circuit court issued the following oral ruling with respect to the appellants' Motion for Summary Judgment:

> The Court is going to deny [the appellants'] Motion for Summary Judgment. The Court feels that under the circumstances of this case the issue was created by the fact that Summary Judgment was filed late, and as a result, [the appellee] filed a Motion to Strike. That was the response waiting for the Court to act upon that Motion. So under the circumstances, I'm going to deny the Motion for Summary Judgment.

It is thus clear that the Motion for Summary Judgment was denied on the ground that it was filed beyond the deadline for dispositive motions set forth in the scheduling order. As we explained in *Butler v. S & S P'ship*, 435 Md. 635, 650 (2013),

> the governing principle that the appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court, and that the more draconian sanctions, of dismissing a claim or precluding the evidence necessary to support a claim, are normally reserved for persistent and deliberate violations that actually cause some prejudice, either to a party or to the court.

Id. (quoting *Admiral Mortgage, Inc. v. Cooper,* 357 Md. 533, 545 (2000)). Therefore, we review the circuit court's denial of the appellants' Motion for Summary Judgement under an abuse of discretion standard. *Id.*

"An abuse of discretion occurs 'where no reasonable person would take the view adopted by the court' or if the court acts 'without reference to any guiding rules or

principles.'" *Serio v. Baystate Properties, LLC*, 209 Md. App. 545, 554 (2013) (quoting *North v. North,* 102 Md.App. 1, 13 (1994)).

C. Analysis

Maryland Rule 2-504 states that "[u]nless otherwise ordered by the County Administrative Judge for one or more specified categories or actions, the court shall enter a scheduling order in every civil action[.]" *Id.* at § 2-504(a). The Rule goes on to indicate that "[a] scheduling order shall contain . . . a date by which all dispositive motions must be filed, which shall be no earlier than 15 days after the date by which all discovery must be completed." *Id.* at § 2-504(b)(1)(E).

The purpose of Rule 2-504 has been described as "two fold: to maximize judicial efficiency and minimize judicial inefficiency." *Faith v. Keefer*, 127 Md. App. 706, 732 (1999) (quoting *Naughton v. Bankier*, 114 Md. App. 641, 653, 691 A.2d 712 (1997)). *Accord Dorsey v. Nold*, 362 Md. 241, 255 (2001) ("The principal function of a scheduling order is to move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to occur.").

This Court has indicated that "while absolute compliance with scheduling orders is not always feasible from a practical standpoint, we think it quite reasonable for Maryland courts to demand at least substantial compliance, or, *at the barest minimum,* a good faith and earnest effort toward compliance." *Faith*, 127 Md. App. at 733 (quoting *Naughton*, 114 Md. App. at 653) (emphasis in original). Moreover,

> [w]hen a trial court permits a party to deviate from a scheduling order without a showing of good cause, such action by the trial

> court would be "on its face, prejudicial and fundamentally unfair to opposing parties, and would further contravene the very aims supporting the inception of Rule 2–504 by decreasing the value of scheduling orders to the paper upon which they are printed."

Id.

The Motion for Summary Judgment in the case at bar was filed over six months past the dispositive motions deadline, and the appellants have not so much as made an attempt to show good cause for its untimeliness. As such, the circuit court did not abuse its discretion where it denied the motion.

II. Motions for Judgment on the Evidence

A. Parties' Contentions

The appellants argue that the circuit court erred where it denied their motions for judgment on the evidence for the same reasons they believe the court erred in denying their pre-trial Motion for Summary Judgment.

Aertight asserts that the evidence that Albers and Lang "factory reset" their company phones before returning them to Triplett, "the timeline of the actions taken by Appellants" following Palmer's termination, the "[n]umerous e-mails . . . [in which] Mr. Palmer freely provided the new cell phone numbers and e-mail addresses of Mr. Albers and Mr. Lang to Aertight customers before these customers ever committed to joining AMP," and the evidence that Lang was "providing labor estimates for the pitches to Aertight customers that Mr. Palmer made immediately after Mr. Lang and Mr. Albers quit," when combined, was sufficient to generate a jury question. As such, Aertight contends that

the circuit court did not err in denying the appellants' motions for judgment on the evidence and motion for a mistrial.

B. Standard of Review

In *Barrett v. Nwaba*, 165 Md. App. 281-90, (2005), we explained that

> [p]ursuant to Maryland Rule 2-519(a), "A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all of the evidence. The moving party shall state with particularity all reasons why the motion should be granted." "'[T]he trial judge must consider the evidence, including the inferences reasonably and logically drawn therefrom, *in the light most favorable to the party against whom the motion is made.* If there is any evidence, no matter how slight, legally sufficient to generate a jury question, the motion must be denied....'" *Tate v. Bd. of Ed. of Prince George's County,* 155 Md. App. 536, 545, 843 A.2d 890 (2004) (quoting *James v. General Motors Corp.,* 74 Md. App. 479, 484-85, 538 A.2d 782 (1988)) (emphasis in *Tate*).

On review of a circuit court's ruling on a motion for judgment on the evidence, we apply

> the same analysis used by the trial court. *Moore v. Myers,* 161 Md. App. 349, 362, 868 A.2d 954 (2005). In other words, "'[w]e assume the truth of all credible evidence on the issue, and all fairly debatable inferences therefrom, in the light most favorable to the party against whom the motion is made.'" *Id.* (quoting *Tate,* 155 Md. App. at 544, 843 A.2d 890) (alteration in *Moore*).

Barrett, 165 Md. App. at 290.

C. Analysis

At the outset, we recognize that the circuit court did not expressly grant or deny the appellants' motions for judgment on the evidence, but instead reserved its ruling thereon

pending the jury's verdict. Such an action is specifically allowed by the Maryland Rules. *See* Md. Rule 2-519(d) ("In a jury trial, if a motion for judgment is made at the close of all the evidence, the court may submit the case to the jury and reserve its decision on the motion until after the verdict or discharge of the jury."). However, "[f]or purposes of appeal, the reservation constitutes a denial of the motion unless a judgment notwithstanding the verdict has been entered." *Id.* Thus, as the court did not enter a judgment notwithstanding the verdict in the present case, we shall treat the appellants' motions for judgment on the evidence as if they have been expressly denied.

The appellants rely heavily on *Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, *supra*, in support of their argument that because Albers and Lang did not initiate contact with any of Aertight's customers, they did not violate their non-solicitation agreements as a matter of law. Aertight responds that *Mona Elec.* is inapposite because that case "did not address the restrictive covenant here, which not only precludes the solicitation of customers, but the arranging of other persons (like Mr. Palmer) and entities (like AMP) to engage in solicitations."

In *Mona Elec.*, the United States Court of Appeals for the Fourth Circuit, in a *per curiam* decision, applied Maryland law to interpret an employment agreement containing the following restrictive covenant: "The employee agrees that for a period of one year after he leaves the employment of the employer, he will not attempt to solicit any of the employer's customers for himself or for any other electrical or technology contractor." *Mona Elec.*, 56 F. App'x at 109. The Court ultimately held that "the plain meaning of

'solicit' requires the initiation of contact." *Id.* at 111. Therefore, because there was no evidence that the former employee initiated contact with Mona's customers, rather than *vice versa*, the Fourth Circuit affirmed the district court's entry of summary judgment against the company. *Id.*

We agree with Aertight that *Mona Elec.* is too distinguishable to be decisive in our analysis. The employee in *Mona Elec.* signed an agreement that he would not "attempt to solicit" any of Mona's customers for a period of one year following the termination of his employment. *Id.* at 109. Albers and Lang, however, agreed to "not solicit, or *arrange to have any other person or entity* solicit," any of Aertight's customers for a period of two years after leaving the company. (Emphasis added). Thus, the non-solicitation clause signed by Albers and Lang is patently more restrictive than the one discussed by the Fourth Circuit, and *Mona Elec.* does not apply.

Aertight draws our attention to *Wachovia Ins. Servs., Inc. v. Hinds*, No. CIV WDQ-07-2114, 2007 WL 6624661 (D. Md. Aug. 30, 2007), as an example of a case that "found that . . . a former employee can breach the contract if the new employer is touting the employee bound by the restrictive covenant in dealing with customers." Aertight's characterization of this memorandum opinion, however, is inaccurate.

Wachovia Ins. Sers., much like the present case, involved a non-solicitation clause in an employment contact that provided: "Hinds may not 'directly or indirectly . . . cause or attempt to cause' any such customers or prospective customers 'to refrain from maintaining or acquiring' any business from Wachovia." *Id.* at 5. In finding that Hinds'

communications with one of her former employer's clients was "indicative of solicitation," *id.* at 6, the United States District Court for the District of Maryland, Northern Division stated:

> On August 7, 2007, Hinds met with Arent Fox representatives to discuss HRH's services. At that meeting, Arent Fox received a presentation from HRH touting Hinds's past service with Arent Fox and her continued involvement with the Arent Fox account if HRH was selected. At the hearing, Hinds admitted that she added the language about her past service because she believed that Arent Fox wanted to continue to work with her. On August 9, 2007, Arent Fox became a client of HRH.
>
> Even if Hinds did not initiate contact with Arent Fox, she may have actively solicited them to move from Wachovia to HRH. She referenced her past service at Wachovia to help HRH secure Arent Fox as a client. Waiting for clients to call and then actively trading on the services provided by a previous employer do not remove Hinds's activity from the scope of the nonsolicitation agreement.

Id. (internal citations omitted). Clearly, it was not her new employer's actions, as Aertight suggests, but her own that led the court to conclude that Hinds violated the non-solicitation clause of her employment contract.

In the present case, Aertight failed to present any evidence that Albers or Lang "arrange[d] to have" Palmer solicit its customers. The argument that the "timeline of the actions taken by Appellants" supports the solicitation of Aertight customers by Albers and Lang is, indeed, merely speculation. Moreover, the facts that Palmer provided AMP cell phone numbers and email addresses for Albers and Lang in the same emails in which he furnished Aertight customers with letters of engagement, and that Lang provided Palmer with a labor estimate for a pitch to an Aertight customer, are not relevant to whether Albers

or Lang arranged to have Palmer solicit customers in violation of their employment contracts. "[T]he plain meaning of 'solicit' requires the initiation of contact." *Mona Elec.*, 56 F. App'x at 110. None of the aforementioned evidence touches upon whether Albers or Lang arranged to have Palmer *initiate* contact with any of Aertight's customers. At most, Aertight's evidence touches upon whether Albers and Lang assisted Palmer with his pitches to Aertight customers *after* contact had already been initiated. Such conduct, while barred by a standard non-competition clause, was not precluded by the non-solicitation agreement in this case.

For the aforementioned reasons, we hold that the circuit court erred where it denied the appellants' motions for judgment on the breach of contract count and, *ipso facto*, on the breach of the duty of loyalty, tortious interference with contract, civil conspiracy, and unfair competition counts stemming therefrom.[4]

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.

[4] Without evidence that Albers and Lang breached their non-solicitation agreements, Aertight cannot prevail on the remaining counts, as they all require a breach of contract or unlawful, unfair, or wrongful action.