MISSOURI CIRCUIT COURT

TWENTY-SECOND JUDICIAL CIRCUIT

(City of St. Louis)

KENNETH W. SPRINGER,	)	
Plaintiff,	)	
vs.	)	Cause No. 1322-CC01225
	)	Division 21
MCGRATH & ASSOCIATES, INC.,	)	
Defendant.	)	

JUDGMENT

On September 3, 2015, a bench trial was held in the above-styled cause on the Petition filed May 20, 2013. Plaintiff Kenneth W. Springer, [hereinafter referred to as Springer], appeared in person and with attorney Richard Garner. Defendant McGrath & Associates, Inc., [hereinafter referred to as McGrath], appeared by its representative, Kenneth W. Knobbe, Jr., [hereinafter referred to as Knobbe], and attorney Gregory F. Hoffmann. As Defendant's Motion to Dismiss Count II of the Petition had been granted on August 23, 2013, the trial was as to Count I only, the breach of contract claim. Upon submission and receipt of proposed findings of fact and conclusions of law by both parties, the matter was taken as heard and submitted on November 4, 2015.

FINDINGS OF FACT:

1. Plaintiff Springer is a resident of Lincoln County, State of Missouri.

2. Defendant McGrath is a Missouri corporation with its principal place of business in the City of St. Louis, State of Missouri.

3. In late 2007, a Subcontract Agreement was entered into between Skanska USA Building Inc. [hereinafter referred to as Skanska] and McGrath [Defendant's Exhibit A]. Skanska was contractor and McGrath was the subcontractor [Defendant's Exhibit A]. This agreement involved a demolition project at Scott Air Force Base in the State of Illinois [Exhibit A].

4. The Army Corps of Engineers was the owner of the project [Defendant's Exhibit A].

5. In 2008, Springer worked for McGrath in the capacity of project superintendent of the Skanska project.

6. Employees who obtained shares of the company became parties to the 1998 Stockholder's Agreement and its First Amendment [Plaintiff's Exhibits 1 and 2].

7. On April 4, 2008, Springer was terminated from McGrath.[1] At that time, Springer owned 1667 shares of McGrath stock [Plaintiff's Exhibit 3].

8. After his termination, it was discovered that Springer took possession of

[1] Springer's termination was not due to the scrapping allegations as that activity did not come to light until after the termination occurred.

scrap materials from the Skanska project and sold same.

9. McGrath produced receipts from Vince Jacks Metal Co. [hereinafter referred to as Vince Jacks] in the total amount of $10,944.08, purportedly received by Springer as and for the sale of scrap material Springer collected from the Skanska project site [Defendant's Exhibit D].

10. McGrath further produced receipts from Grapperhaus Metal Company [hereinafter referred to as Grapperhaus] in the amount of $9,030.70, purportedly received by Springer as and for the sale of scrap material Springer collected from the Skanska project site [Defendant's Exhibit E].

11. The total amount paid for scrap materials between Vince Jacks and Grapperhaus is $19,974.78.

12. Springer by and through testimony did not refute the total amount of $19,974.78. Additionally he testified that he did not report a dollar amount to McGrath regarding the scrapping conduct as he did not think it was relevant.

13. Springer did contend that approximately $3,900.00 of the $19,974.78 came from personal scrapping items, and not those taken from Skanska. Thus Springer contends that the total amount related to scrapping from the Skanska project is $16,074.78 [$19,974.78 - $3,900.00].

14. Knobbe testified in his deposition that any materials on the job site

considered scrap that could be sold as profit did not belong to McGrath, but to the company responsible for ICON Demolition, the company hired to dispose of materials.

15. Knobbe further testified that it was ICON's responsibility to get rid of scrapped materials and that any scrapped materials belonged to ICON [Knobbe Deposition, p. 27].

16. Knobbe further testified that prior to the Skanska project, there was no written policy about scrapping, though there were practices in place, applied on different contracts [Knobbe Deposition, p. 27].

17. At the time of his termination, Springer was still the owner of 1667 shares of stock.

18. The total value of those shares was $43,125.29 [(1667 shares) x (stock price of $25.87)] [Plaintiff's Exhibit 6].

19. Upon termination of employment of a stockholder, the Stockholder's Agreement provided an option to McGrath to purchase stock held by that stockholder [Plaintiff's Exhibit 1, paragraph 5].

20. The option could be exercised between the date of termination (April 4, 2008) and 120 days thereafter [Plaintiff's Exhibit 1, paragraph 5].

21. If the option was exercised, written notice was to be mailed to the

stockholder scheduling the closing of the stock purchase no later than thirty days of said notice [Plaintiff's Exhibit 1, paragraph 7(a)].

22. The price of the stock is the book value per share at the close of the fiscal year immediately preceding the relevant date which in this case is the date of termination, April 4, 2008 [paragraph (b) of Plaintiff's Exhibits 1 and 2].

23. The purchase price of the stock was to be paid as follows: 20% was to be paid at closing with the remaining balance paid in four annual installments, carrying interest calculated at the prime rate as published in the Wall Street Journal on the publication date next preceding the closing date [Plaintiff's Exhibit 1, paragraph 7(c)].

24. If the tender of the purchase price was refused, the company could make the payments to an account at Nations Bank or any financial institution in St. Louis City or County, to be held for the owner of said shares [Plaintiff's Exhibit 1, paragraph 7(d)].

25. On May 21, 2008, Knobbe sent a letter to Springer advising that he had learned of the scrapping activity and demanded an accounting of same from Springer [Defendant's Exhibit F].

26. As of June 30, 2008, McGrath had not received a response from Springer and another letter was sent, informing Springer that McGrath was exercising its option to purchase Springer's stock [Defendant's Exhibit J]. Said

notice was in compliance with the 120 day time standard established in the Stockholder's Agreement [Plaintiff's Exhibit 1, paragraph 5].

27. The June 30th letter also advised Springer that though the stock price was $43,125.29, McGrath intended to offset that amount by the $19,974.68 paid for the scrapped materials. McGrath intended to pay to Springer the sum of $23,150.61 and a closing date of July 21, 2008 was scheduled [Defendant's Exhibit J]. Said closing date was in compliance with the 30 day time standard established in the Stockholder's Agreement [Plaintiff's Exhibit 1, paragraph 7].

28. Springer sent a letter dated July 14, 2008 to McGrath which included a detailed accounting of how he dispersed the scrapping proceeds [Defendant's Exhibit K].

29. The closing scheduled for July 21, 2008 did not occur as Springer failed to appear for same [Plaintiff's testimony].

30. McGrath sent Springer a letter dated July 28, 2008 which contested the accounting in Springer's July 14, 2008 letter [Plaintiff's Exhibit 10].

31. On August 5, 2008, McGrath sent Springer a cashier's check in the amount of $23,150.61 as and for Springer's stock [Defendant's Exhibit L].

32. Plaintiff refused tender by McGrath of the partial purchase price

[Plaintiff's testimony].[2]

CONCLUSIONS OF LAW:

There are three issues that must be addressed: first, who is the rightful owner of the 1667 shares of McGrath stock; second, whether any value of the stock shares can be offset by the scrapping figures; third, the present value of the stock shares.

OWNERSHIP:

The Stockholder's Agreement gave McGrath 120 days from the date of termination to exercise the option. Springer's termination occurred on April 4, 2008. Closing of the stock purchase must be scheduled within 30 days of said notice. In the present case, McGrath sent notice by certified mail to Springer within 120 days expressing McGrath's intent to exercise the option. The letter was sent on June 30, 2008 [Defendant's Exhibit J]. Additionally, the closing was timely scheduled as it was set for July 21, 2008, within thirty days of the notice [Plaintiff's Exhibit 1, paragraph 7(a)].

McGrath did not tender any payment to Springer until August 5, 2008. McGrath argued that payment was timely as it had been made within 150 days of

[2] By agreement between the parties, the cashier's check has been deposited by Plaintiff without any prejudice to Plaintiff's claims in this matter.

Springer's termination. The Court disagrees and finds that McGrath had only thirty days after June 30, 2008 in which to close the stock purchase. Payment therefore tendered on August 5, 2008 is deemed by the Court as untimely.

The Court however does agree with McGrath's argument that Springer's failure to appear for said closing forfeits Springer's arguments with respect to same. As stated in Hillis v. Blanchard, 433 S.W.2d 276 (Mo. Banc 1968), "[o]ne who hinders performance by the other party may not avail himself of the non-performance which he induced or occasioned." Hillis, at 279. Springer's failure to appear at closing prevented McGrath from complying with the procedure for purchasing the stock as outlined in paragraph 7(c) of the Agreement in which 20% of the total price was to be paid in cash at the closing.

The Agreement outlines the procedure in the occurrence of a stockholder refusing tender of payment. Once Springer failed to appear at closing, in essence refusing to accept any payments for the stock, McGrath had the authority to tender the payments due to Nations Bank, N.A. or any other bank in the City or County of St. Louis, to be held for the owner of said shares. Upon making these payments, McGrath would be authorized to transfer said shares of stock [Agreement, paragraph 7(d)]. As McGrath failed to comply with the conditions of said paragraph, Springer, in the Court's opinion is still the rightful owner of the 1667 shares of stock at issue.

SCRAPPING OFFSETS:

Knobbe testified that though scrapping had occurred on jobs performed by McGrath in the past, there was no specific written policy regarding the scrapping of materials from a job site. He further testified that there had been no discussions with superintendents on the job site regarding what to do with scrapped materials. In this case, McGrath had subcontracted with ICON for demolition and removal and it was Knobbe's belief that any "scrappable" material did not belong to the owner of the project, but instead belonged to ICON [Knobbe's deposition, p. 27, lines 9-12].

Both Springer and Knobbe agreed that on past McGrath job sites, monies earned from scrapping had been used as an incentive for successful, and at times, early completion of the projects. Knobbe testified that the decisions on what to do with monies earned from scrapping were made by the project managers, not the superintendents. Springer testified that though there was no written policy, scrapping was a standard operating procedure in the industry and that the superintendent of a project could choose to put the money back into the project toward incentives such as "safety lunches" or some would simply use the money for their own benefit.

Springer testified that he used the monies earned from the scrapping materials for the workers and he provided an accounting to McGrath [Defendant's Exhibit K]. Springer contends that at least $3,900.00 was his own personal scrapped materials, not part of the SAFB project. McGrath argued that Springer did not have the right to scrap any of the materials from the SAFB project and also contested Springer's accounts as to what the monies were used for. Springer's attestation to the court of his disposal of the monies, while doubtful, was not in its entirety refuted by McGrath. Thus, the court accepts the testimony of Springer and figures contained in Exhibit K.

McGrath further argues that Springer, as McGrath's employee, had a duty to McGrath and owed a loyalty to the employer. McGrath argues that Springer violated this duty by scrapping and using the monies, some for his own personal gain, without the authority or permission of McGrath. In its Proposed Findings filed with the court, McGrath cites two cases to support this proposition of a violation of the employee's duty to an employer. The first is Kantel Communications, Inc. v. Casey, 865 S.W.2d 685 (Mo. App. W.D. 1993). This case involved a lawsuit alleging tortious interference with a business expectancy. A former sales manager of Kantel Communications, James Hansen, secured a contract for Kantel to install telephone systems in the Cass County jails. Hansen was subsequently fired by Kantel on March 5th, however prior to his termination,

Hansen had been working on starting up the competing company Best Serve, Inc. Hansen never told Kantel about the contract with Cass County. In addition, when Hansen met with Cass County jail representatives to discuss why Kantel had not yet installed the systems, Hansen represented that Kantel had financial issues which prevented the company from fulfilling the contract. Hansen and Best Serve were then awarded the telephone installation contract. The court found that Hansen violated a duty of loyalty to Kantel because Hansen worked towards Best Serve's best interest while still employed by Kantel. Kantel at 692. The court held in favor of Kantel, finding that the company had a reasonable business expectancy that was usurped by Hansel and Best Serve.

This case is not applicable in that Springer did not act for a competitor nor against a specific business interest of McGrath. Knobbe testified in his deposition that the owner of the "scrappable" material was ICON [Knobbe deposition, p. 27, lines 9-13]. He further testified that neither ICON, owners of the scrap recycled by Springer, nor any other agency involved in the SAFB project ever filed suit or made a claim against McGrath to recoup the so-called "losses" incurred by McGrath as a result of the scrapping.

McGrath also, in its Proposed Findings, cites the case of Seck v. Department of Transportation, 434 S.W.3d 74 (Mo. banc 2014), to support its supposition that Springer's failure to give the monies made from the scrapping at issue to McGrath

violated standards of behavior that McGrath has a right to expect from its employees. In Seck, an employee falsified a medical note by changing his return to work date from August 2nd to August 8th. Seck was fired and also denied unemployment benefits because of his conduct. The court found that Seck's behavior fell below the standard of behavior to be expected from employees. "Even though it apparently is not stated among its express rules for employees, MoDOT – like all employers – is entitled to expect that its employees will not falsify medical certificates required from and signed by the employees' physicians." Seck at 84.

In the present case, this court is not naïve enough to believe that Springer's scrapping activities were selfless and completely for the benefit of his "men" when he scrapped the materials. Springer does admit that he did profit from the scrapping activity. Yet whether one believes Springer's account, that the majority of the monies were spent on the men, or McGrath's account, that the monies went primarily to Springer, the court does not find McGrath's argument that the scrapping behavior fell below loyalty standards between employee and employer to be convincing.

McGrath appears to take umbrage with the amount of money Springer made from the scrapping activity instead of the actual scrapping itself. The court finds that Springer's shock and confusion as to the dander raised regarding the scrapping

is disingenuous. The court also finds that Springer's actions are inherently inconsistent with the interest of McGrath. However, the court finds that without a policy in place and no discussions with the workers/superintendents/project managers on this particular job site about scrapping, McGrath's argument that Springer should forfeit the proceeds because he violated a duty to his employer must fail. McGrath is not entitled to recover the scrapping proceeds.

Lastly, the court must determine the value of the 1667 shares of stock owned by Springer. Springer should not be allowed an added windfall of using the stock values at the end of the 2014 fiscal year ($36.42) [Plaintiff's Exhibit 9]. The court finds that the stock value is the value at the time of termination ($25.87) [Plaintiff's Exhibit 9]. Thus the total amount owed for the 1667 shares owned by Springer is $39,225.29[3] (1667 shares x $25.87) plus interest at 5% per Plaintiff's Exhibit 4].

WHEREFORE, it is ordered, adjudged and decreed that judgment is in favor of the Plaintiff, Kenneth W. Springer, as and against Defendant, McGrath and Associates, Inc., in the amount of $39,225.29 plus interest.

[3] This figure represents the total amount due minus the $3,900.00 which Springer admitted to was his own personal scrap earnings and not monies shared with the workmen.

SO ORDERED: 2/1/16

Judge Robin Ransom Vannoy, Division 30