

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NOVUS FRANCHISING, INC.,

Plaintiff,

v.

SUPERIOR ENTRANCE SYSTEMS, INC.,
SUPERIOR GLASS, INC., and KNUTE
PEDERSEN,

Defendants.

OPINION AND ORDER

12-cv-204-wmc

This case concerns a contract dispute between a plaintiff auto glass franchisor and defendants, its franchisees. On September 5, 2012, the court granted partial summary judgment in favor of plaintiff. (Dkt. #105.) This prompted the parties to conditionally settle the remaining questions concerning liability and damages, leaving only the issue of equitable relief. (Dkt. #107.) In a subsequent order, the court imposed a two-year injunction barring defendants from competing with plaintiff via their existing “Superior Glass, Inc.” business. (Dkt. # 120.) Shortly thereafter, the court entered final judgment. (Dkt. #121.) Defendants now ask the court to extend the deadline to appeal until the date at which the court issues an award of attorneys’ fees. They also ask the court to stay the execution of judgment pending appeal. The court will deny both requests.

OPINION

I. Request to Extend the Deadline to Appeal Until Fees are Awarded

When a district court has entered a final judgment on the merits of a case, the entry of a subsequent order granting or denying an award of attorneys' fees for the case is a separate proceeding having no effect on the finality of the merits judgment. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988); *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 456 (7th Cir. 2005). As a general matter, therefore, appeals must be filed within 30 days of the entry of the merits judgment, regardless of whether a motion for attorneys' fees has been decided. *See* Fed. R. App. P. 4(a)(1)(A). Pursuant to Federal Rule of Civil Procedure 58(e), a party may request that a court extend the deadline for filing an appeal until 30 days after attorneys' fees have been awarded. This is what defendants now request.

Defendants assert that the amount of attorneys' fees awarded will "likely be a major deciding factor" in whether they ultimately appeal, but of course the same could be said for many would-be appellants, so in itself this is hardly a compelling reason to depart from the default procedures established by the Federal Rules. In the absence of good grounds to delay, the court will not grant defendants' request. The court will, however, expedite briefing of this fee issue as set forth in the order below, and will endeavor to issue its ruling on fees within days of the reply brief.

II. Request for Stay Pending Appeal

In considering requests to stay execution of a judgment pending appeal, federal courts apply a four-factor test:

(1) whether the state has made a strong showing that it is likely to succeed on the merits of its appeal; (2) whether the state will be irreparably harmed absent a stay; (3) whether the issuance of a stay will substantially injure the other parties to the proceeding; and (4) where the public interest lies.

Etherly v. Schwartz, 590 F.3d 531, 532 (7th Cir. 2009) (citing *O'Brien v. O'Laughlin*, 557 U.S. 1301, *6 (2009); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Defendants make no argument whatsoever regarding the likelihood of success on appeal, let alone the “strong showing” required at this stage. This by itself disqualifies their petition. Instead, they rest entirely on a parade of horrors that supposedly will follow from enforcement of the noncompetition clause: they will be forced to “undertake one of two extremely drastic courses of action regarding their business,” which will disserve the public interest and injure innocent third parties, most notably employees of Superior Glass, Inc. Many of these anticipated harms are at this point only conjectural, if not wholly unsupported by facts, and thus can be given little weight here. *See Stroman Realty, Inc. v. Martinez*, 505 F.3d 658, 664 (7th Cir. 2007) (“[S]peculation does not rise to the level of irreparable harm that would justify the intervention of a federal court.”).

Even taking all of defendants’ assertions as true, at the end of the day they are the same considerations the court had in mind when it granted the injunction defendants now wish to delay; indeed, they are the same arguments that were made at the initial preliminary injunction phase, at summary judgment, and in briefing regarding the proper

scope of equitable relief after liability was determined. (See dkt. ## 55, 105, 120) Defendants' renewed protestations at this stage call to mind Scheherazade -- the Persian queen and storyteller of Arabian lore who ingeniously forestalled her own execution day after day -- except she told a *new* story each day. Defendants have managed to avoid compliance with the noncompetition clause for long enough, ultimately to the detriment of Novus's ability to re-franchise in the Superior, Wisconsin, auto glass repair market. (See Order on Summary Judgment, dkt. #105, at 27-28). It is time to enforce the clause.

III. Timeline for Compliance

Finally, the parties' motions reveal an oversight in the court's December 27, 2012, order, which was a failure to set a firm deadline by which Knute Pedersen must come into compliance with the covenant not to compete. While defendants correctly read into the order an implied duty to diligently achieve compliance, there has been disagreement about what diligence means. To be more explicit now, Pedersen has two options: either divest all interest and control in Superior Glass, Inc., or ensure that Superior Glass, Inc. does not perform any auto glass repair. Whichever he chooses, he will have one month from the date of this order to fully comply.

ORDER

IT IS ORDERED that

1. Defendants' Motion for Clarification (dkt. # 122), is DENIED;
2. Defendant Knute Pedersen must achieve compliance with the auto glass repair noncompetition clause within one month of the date of this order; and

3. The initial briefing schedule for attorneys' fees (*see* court docket entry for 01/14/2013) is amended as follows: Brief in Opposition due 1/24/2013. Brief in Reply due 2/1/2013.

Entered this 17th day of January, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge