AGERO, INC. v. RUBIN

NO. 14-P-932.

AGERO, INC. vs. STEVEN RUBIN & others.

Appeals Court of Massachusetts.
September 8, 2015.

By the Court (Cypher, Hanlon & Agnes, JJ.)

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass.App.Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass.App.Ct. 258, 260 n.4 (2008).

The plaintiff, Agero, Inc. (Agero), appeals from a Superior Court judgment for the defendants, former Agero employees and their businesses, who are alleged to have taken confidential information from Agero to start a competing business. In granting the defendants' summary judgment motion, the judge determined, among other things, that based on the undisputed facts, information taken by the defendants was not confidential, and that the various contracts between Agero and the defendants did not prohibit their conduct. We affirm, principally because there is no evidence in the record before us that Agero was harmed as a result of any conduct by the defendants. We also conclude, as did the judge, that Agero failed to establish that two of the defendants, Timothy Schneider and Matthew Capozzi, owed Agero a duty of loyalty.

1. Background.

We summarize the undisputed facts relevant to this appeal from the judge's February 25, 2014, "Memorandum of Decision and Order on the Parties' Cross Motions for Summary Judgment," which we supplement from the record, as needed.

Agero describes itself as one of the largest private-label providers of automotive services to the insurance and automotive manufacturing industries, primarily related to emergency towing and roadside assistance programs. The defendants are Steven Rubin, Schneider, and Capozzi, all former Agero employees, along with their company, OnSource, LLC (OnSource), and Schneider's separate business, Pro Survey Solutions.

Rubin worked for Agero until November, 2008, signing a severance agreement upon his

departure that reaffirmed his confidentiality and nonsolicitation agreements with the company. Schneider began working for Agero in June, 2004 as a technical product manager and, after several promotions, held the position of vice president-insurance product manager as of January 1, 2011. Schneider signed a confidentiality and nonsolicitation agreement with Agero when first hired in 2004. Capozzi began working for Agero in August, 2008, signing a confidentiality and nonsolicitation agreement at that time as well.

In addition to his position with Agero, Schneider was also president of Pro Survey Solutions (Pro Survey), an unincorporated entity he started in 2005 or 2006 that provided marketing surveys for Agero. Pro Survey and Agero executed an agreement in September, 2010, dealing with the survey services provided by Pro Survey, and containing a noncompetition provision that prohibited Pro Survey from working in competition with Agero. Schneider signed the agreement as Pro Survey's president.

In 2006, Agero began developing a new product whereby tow truck drivers and other people in the field could perform property assessments at the scene of an accident to facilitate the claims process for insurance companies. The project eventually became known as ViewPoint, and consisted of independent service providers taking photographs of insured property and uploading them to a server where the insurers could view them. Agero worked with Nationwide Insurance Company (Nationwide), one of its larger clients, in developing and trying out ViewPoint. Nationwide already used another company, StreetDelivery.com, Inc. (Street Delivery), for a similar service, but was interested in the greater efficiency Agero's product might provide.[2]

Schneider began overseeing ViewPoint in January, 2011. Around that time Capozzi became an associate product manager and the product lead on ViewPoint, reporting directly to Schneider. In Schneider's view, ViewPoint was ready to be implemented in a pilot program with Nationwide by the summer of 2011, but the roll-out was repeatedly delayed by Agero's legal department and by senior management. Agero disputes that it held back the roll-out, but the judge noted the absence of evidence that Agero marketed ViewPoint or conducted pilot programs after Schneider and Capozzi left the company. And while the record indicates that ViewPoint was advertised in a trade magazine and was briefly featured on Agero's website, the judge observed that by the fall of 2011, Agero discontinued those efforts and reduced marketing funds for ViewPoint.

In July, 2011, Rubin contacted Schneider and the two met and discussed ViewPoint. Believing that ViewPoint was being held back by Agero, Rubin and Schneider talked about starting their own company to provide a similar but more expansive product to insurance companies. Around the same time, Capozzi began discussing with Schneider the possibility of forming a new company. E-mail exchanges followed, which Agero offered as proof that the defendants were using confidential information about ViewPoint to start a competing business. The information related to the ViewPoint concept, a PowerPoint presentation about ViewPoint, and potential pricing.

OnSource was incorporated on October 31, 2011, listing Rubin, Capozzi, and Schneider as managers, and on November 23, 2011, Schneider and Capozzi left Agero and went to work for OnSource. In December, 2011, Schneider sent an email to a representative from Nationwide, offering an update on OnSource's progress, but Nationwide did not become an OnSource customer.

Agero filed its amended verified complaint, dated February 13, 2012, against the defendants. The complaint alleged that Rubin, Schneider, and Capozzi breached their respective confidentiality and nonsolicitation agreements, that ProSurvey breached its noncompetition agreement, that Schneider and Capozzi breached their duty of loyalty to Agero, and that OnSource tortiously interfered with an advantageous business relationship. In addition, all the defendants were alleged to have misappropriated trade secrets, violated G. L. c. 93A, and interfered with contractual relations.[3]

Agero sought a preliminary injunction against the defendants to bar them from competing

with Agero. A judge allowed the motion in part, ordering the defendants to refrain from using and to return to Agero any proprietary materials involving ViewPoint training, checklists, or software, and to return to Agero any service provider lists and videos developed by Agero. The motion was denied in all other respects, the judge reasoning that the general concept of ViewPoint was not secret information and that, "[i]f Agero wanted to prevent employees from leaving and competing, it should have negotiated for, and provided consideration for, a non-competition agreement."

The parties filed cross motions for summary judgment. The motion judge ruled in the defendants' favor on all claims, based primarily on her conclusion that the defendants were entitled to compete with Agero and that Agero failed to raise a genuine issue of disputed fact that the ViewPoint information taken by the defendants was confidential or that the defendants misappropriated any trade secrets. She also ruled that Schneider and Capozzi did not hold positions at Agero that would give rise to a duty of loyalty. She dismissed the claims for breach of the nonsolicitation agreements for want of consideration as to Schneider and Capozzi and because Rubin left Agero in November, 2008, and dismissed the claim for breach of the noncompetition agreement against Schneider because he signed the agreement on behalf of Pro Survey and, in any event, for want of consideration. Finally, she ruled that c. 93A did not apply to the conduct of employees and that Agero failed to establish a c. 93A claim. At the time of the summary judgment proceedings, Agero had not implemented ViewPoint, and OnSource had not made a profit.

2. Causation and damages.

Agero argues that disputed issues of material fact exist, and that, as a result, summary judgment was improper. While our analysis differs from that of the judge, we agree that, contrary to Agero's contention, there are no material facts in dispute, and that, on the record before us, summary judgment was proper.

In brief, our review of the record indicates that Agero failed to meet its summary judgment burden of establishing causation and damages on its various claims. It was reported at oral argument that ViewPoint still is not operational, nearly four years after Schneider and Capozzi's departure from Agero, and that OnSource is still not profitable. Agero cannot blame Viewpoint's failure to launch, at this late date, on any alleged disruption or delay caused by the defendants' departure, when Agero has had a reasonable period of time to replace them with other qualified employees and get the project back on track. See Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 175-176 (1991). Furthermore, the usual measure of damages in such cases is compensation for the plaintiff's lost profits and the surrender of the defendant's profits that were gained by wrongdoing. Jet Spray Cooler, Inc. v. Crampton, 377 Mass. 159, 169 (1979). There was no evidence of lost profits here. Agero took the position at the summary judgment hearing that it sought judgment as to liability only and that proof of damages could be saved for a later time. However, proof of a causal connection between the defendants' alleged misconduct and some harm to Agero was a necessary element of establishing liability. See Augat, Inc. v. Aegis, Inc., supra at 175. Moreover, in opposing the defendants' cross motion for summary judgment, Agero was required to offer proof on each essential element of its claims, including causation and damages. See Karatihy v. Commonwealth Flats Dev. Corp., 84 Mass.App.Ct. 253, 253-254 (2013). Indeed, a failure of proof on one element of the nonmoving party's case renders all remaining disputed facts immaterial. O'Sullivan v. Shaw, 431 Mass. 201, 203 (2000).

We think Agero's failure to come forward with specific evidence of harm that resulted from the defendants' actions undercuts much of its case. To survive the defendants' motion for summary judgment, Agero's various contract and tort-based claims required such proof.[4] As to the former, the "rule of damages in an action for breach of contract is that the plaintiff `is entitled in general to damages sufficient in amount to compensate him for the loss actually sustained by him, and to put him in as good position financially as he would have been in if there had been no breach. . . . He may not insist upon extraordinary or

been in if there had been no breach. . . . He may not insist upon extraordinary or unforeseen elements of damages, but only such as flow according to common understanding as the natural and probable consequences of the breach. . . .'" Pierce v. Clark, 66 Mass.App.Ct. 912, 914 (2006), quoting from Boylston Hous. Corp. v. O'Toole, 321 Mass. 538, 562 (1947). See Singarella v. Boston, 342 Mass. 385, 387 (1961) (essential element of breach of contract claim is that the breach resulted in harm or damages to the claimant); Schwartz v. Travelers Indem. Co., 50 Mass.App.Ct. 672, 682 (2001) (summary judgment proper where plaintiff had no reasonable expectation of proving that harm resulted from the alleged breach). "While it is true that a plaintiff need not prove damages with mathematical certainty, `damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty.'" Kitner v. CTW Transport, Inc., 53 Mass.App.Ct. 741, 748 (2002), quoting from Lowrie v. Castle, 225 Mass. 37, 51 (1916).

The same holds true for claims arising in tort. In order to survive summary judgment, there must be proof of loss that is causally connected to the tortious conduct, or to the unfair or deceptive conduct for claims under c. 93A. See Multi Technology, Inc. v. Mitchell Mgmt. Sys., Inc., 25 Mass.App.Ct. 333, 337-338 (1988); Jillian's Billiard Club of Am., Inc. v. Beloff Billiards, Inc., 35 Mass.App.Ct. 372, 375 (1993) ("[T]he plaintiffs offered no evidence at trial as to either the amount of their loss caused by the defendants' action or of the amount of gain to the defendants in starting up the competing business"); Shepard's Pharmacy, Inc. v. Stop & Shop Cos., 37 Mass.App.Ct. 516, 522 (1994), quoting from PDM Mechanical Contractors, Inc. v. Suffolk Constr. Co., 35 Mass.App.Ct. 228, 237 (1993) ("[I]n the absence of a causal relationship between the alleged unfair acts and the claimed loss, there can be no recovery").

As noted, Agero sought to defer its burden of proving damages at the summary judgment stage, and the judge, though alluding to the lack of injury, did not specifically address the issue. The defendants, for their part, raised the absence of proof of harm at both the summary judgment hearing, and at oral argument before this court. "We may consider any ground supporting [summary] judgment." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Here, we conclude that Agero's failure to offer the requisite proof on an essential element of its claims warrants affirmance of summary judgment. We do except from our holding Agero's claim for breach of the duty of loyalty, to which we now turn, and which we affirm on separate grounds.

3. Duty of loyalty.

Agero's claims against Schneider and Capozzi for breach of their duty of loyalty stand on somewhat different footing. As noted, Agero did not have noncompetition agreements with Schneider and Capozzi,[5] but a duty of loyalty may be imposed on certain employees even in the absence of specific contractual obligations. The claim is based on the premise that "[e]mployees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of the employer." Chelsea Indus., Inc. v. Gaffney, 389 Mass. 1, 11 (1983).[6]

Breach of an employee's duty of loyalty implicates the doctrine of equitable forfeiture, an alternative remedy to recovery for actual damages. "[T]here is substantial authority in Massachusetts that a corporate officer, director, or trusted agent or employee can be required to forfeit the right to retain or receive his compensation for conduct in violation of his fiduciary duties." Id. at 12. Meehan v. Shaughnessy, 404 Mass. 419, 440 (1989). The remedy is an equitable one, which "stems from the premise that the forfeiture remedy is not a penalty but really reimbursement of payment for services not properly performed." In Re Tri-Star Technologies Co., 257 B.R. 629, 637 (Bankr. D. Mass. 2001). See Orkin Exterminating Co. v. Rathje, 72 F.3d 206, 208-209 (1st Cir. 1995); Production Mach. Co. v. Howe, 327 Mass. 372, 378-379 (1951); Astra USA, Inc. v. Bildman, 455 Mass. 116, 134 (2009).

As a result, Agero's failure to offer proof of actual harm to the company does not, in itself, dispose of its claim for breach of the duty of loyalty against Schneider and Capozzi. See

dispose of its claim for breach of the duty of loyalty against Schneider and Capozzi. See Chelsea Indus., Inc. v. Gaffney, supra at 13. See also Orkin Exterminating Co. v. Rathje, supra at 207 (both actual damages and equitable forfeiture available as remedies to the employer). Agero did not raise the issue of equitable forfeiture at summary judgment or on appeal, and we will not reverse summary judgment on grounds not raised below. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006) (issue waived where "[t]he plaintiffs never put the judge on notice that they opposed summary judgment on this theory"). But Agero alleges that Schneider and Capozzi competed with Agero while still in its employ, and did so during regular working hours, and that the record contains evidence that, construed in Agero's favor, supports the contention.[7] We therefore address the claim, which we conclude is without merit in any event.

Agero's claim for breach of the duty of loyalty was properly dismissed because Agero has not shown that Schneider and Capozzi were the type of employees on whom such a duty is imposed. To begin, they were not officers, directors, or key executives of Agero, and the undisputed facts make clear that they lacked authority to move ViewPoint forward and, instead, reported to senior management on matters concerning ViewPoint. See, e.g., TalentBurst, Inc. v. Collabera, Inc., 567 F.Supp.2d 261, 265 (D. Mass. 2008). Compare Orkin Exterminating Co. v. Rathje, supra at 207, 209 (duty imposed on branch manager who operated with autonomy); In Re Tri-Star Technologies Co., supra at 634-635 (duty imposed on key employee involved in all aspects of the business, shared in company profits, and had authority to bind employer in contracts with third parties). We believe Schneider and Capozzi would more aptly be described as "rank-and-file" employees, who do not owe a fiduciary duty to their employer unless they occupy a position of trust and confidence. See Advanced Micro Devices, Inc. v. Feldstein, 951 F.Supp.2d 212, 220 (D. Mass. 2013).

It is undisputed that Schneider and Capozzi were not officers or directors of Agero, and the judge ruled that they lacked access to truly sensitive proprietary information that would give rise to a duty of loyalty. Agero challenges the ruling, urging that Schneider and Capozzi occupied positions of trust and confidence by virtue of their access to Agero's clients and client information. For this, Agero relies on a broad reading of Meehan v. Shaughnessy, 404 Mass. at 438, and analogizes to the many situations in which Schneider and Capozzi worked directly with Agero's clients and potential ViewPoint customers.

Meehan v. Shaughnessy, dealt with the narrow circumstance of attorneys working in a law firm. The holding should be read in the context of membership in a law firm. In particular, the case turns on the fact that an attorney in a law firm, though not a senior or managing partner, may nevertheless have access to client information of a highly sensitive nature and is bound by the attorney-client privilege to hold it in the strictest confidence. Id. at 438. Such individuals, the court observed, "occupied positions of trust and confidence" that ordinarily we do not associate with rank-and-file employees as in this case. Ibid. It was therefore reasonable in Meehan v. Shaughnessy to impose a duty of loyalty on an employee not otherwise in a senior position of authority within the firm. See TalentBurst, Inc. v. Collabera, Inc., supra at 266 n.4. The underlying rationale for the holding in Meehan v. Shaughnessy does not apply to business employees simply because they interact with clients.

Agero also argues that Schneider and Capozzi had a duty of loyalty based on their access to confidential information about ViewPoint. We would be "wary of holding that any employee given access to any confidential information owes a fiduciary duty to his or her employer." Advanced Micro Devices, Inc. v. Feldstein, supra. In Advanced Micro Devices, Inc. v. Feldstein, supra, the court explained that the confidential information to which the former employees had access consisted of intellectual property from which the employer generated much of its revenues and was of substantial value to the employer, rendering summary judgment for the employees inappropriate.

In contrast, there is no evidence in the record before us that the allegedly confidential information to which Schneider and Capozzi had access held substantial value for Agero.

Plainly, neither ViewPoint nor anyconfidential ViewPoint information to which the defendants had access has been the source of any revenue for Agero, much less the cornerstone of its business. Furthmore, the uncontroverted evidence revealed that ViewPoint was not a carefully guarded secret; it was advertised in a towing industry magazine and appeared briefly on Agero's website, and its marketing materials that Agero claims were confidential were intended, according to an affidavit it submitted at summary judgment, for "external use." See, e.g., Jillian's Billiard Club of Am., Inc. v. Beloff Billiards, Inc., 35 Mass. App. Ct. at 375 (information available through advertising and marketing not protected).[8] The idea itself, mainly tow truck drivers taking photographs and making them available to view on a website for a price, would be easy to observe and duplicate once the service was made available for purchase. See id. at 375-376 (no protection for information that "could readily be acquired or duplicated by an observant party"). See also Take It Away, Inc. v. The Home Depot, Inc., 2009 WL 458552, at 6 (D. Mass. 2009) (business concept that once implemented would be easy to duplicate by others was not a trade secret). And another company, Street Delivery, already provided a similar service.

Accordingly, Agero has not persuaded us that Schneider and Capozzi's access to potential ViewPoint customers or to allegedly confidential information about ViewPoint was sufficient to impose a fiduciary duty that, if breached, would warrant forfeiture of some or all of their compensation. Agero's claims against Schneider and Capozzi for breach of the duty of loyalty were properly dismissed.

4. Conclusion.

We need not comment on the defendants' suggestion that Agero brought this complaint against them, despite Agero's size and apparent lack of interest in pursuing ViewPoint, to send a message to other Agero employees who might entertain thoughts of leaving and lawfully competing. That Agero reportedly sued Schneider on Christmas Eve, when Schneider's oldest child was five years old, might lend credence to the charge. However, we do reiterate that noncompetition agreements would be the better practice to achieve that goal. Based on the record before us, Agero's claims were properly dismissed.

Judgment affirmed.

FootNotes

1. Timothy Schneider, Timothy Schneider doing business as Pro Survey Solutions, Matthew Capozzi, and OnSource, LLC.

9. The panelists are listed in order of seniority.

2. Schneider testified that although Street Delivery already provided the photographing service to Nationwide, Nationwide raised the idea that "because of Agero's size and scale, that they could do it at a more cost effective and faster pace."

3. Agero also claimed that the defendants violated the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(4) (2012), a claim not pursued in this appeal.

4. We discuss separately Agero's claim for breach of the duty of loyalty against Schneider and Capozzi, a claim that permits an alternative form of recovery based on equitable principles.

5. We reject Agero's argument that Schneider, as an individual, was restrained as an Agero employee by the noncompetition agreement with Pro Survey. Such agreements not to compete are strictly construed. See Sentry Ins. v. Firnstein, 14 Mass.App.Ct. 706, 707 (1982). We agree with the judge that the only reasonable interpretation of the agreement, which was between Agero and Pro Survey, signed by Schneider as president of Pro Survey, and related solely to survey services, was to prohibit Pro Survey from performing surveys for Agero's competitors.

6. In contrast to an at-will employee, who "may properly plan to go into competition with his employer and may take active steps to do so while still employed," Augat, Inc. v. Aegis, Inc., 409 Mass. at 172, "an executive employee is `barred from actively competing with his employer during the tenure of his employment, even in the absence of an express covenant so providing' (emphasis in original)." Chelsea Indus., Inc. v. Gaffney, supra at 11-12, quoting from Maryland Metals, Inc. v.

Metzner, 282 Md. 31, 38 (1978).

7. There is mention in the record of a cost incurred by Agero to fix a software update for a camera that, according to Agero, Schneider and Capozzi improvidently purchased to sabotage ViewPoint. Other than Agero's claim for breach of the duty of loyalty, the complaint does not include a claim that would encompass employee sabotage. In any event, the record does not indicate that Agero brought this expense to the judge's attention in opposing summary judgment, even when the defendants complained of the absence of proof of damages.

8. Agero points to the broadly-worded confidentiality agreements with the defendants and with Nationwide, and to conclusory statements in it affidavits, to establish that the defendants had access to confidential information about Viewpoint. Though we need not decide the issue, we note that assertions of confidentiality do not determine "whether the information sought to be protected is, in fact and in law, confidential." Jillian's Billiard Club of Am., Inc. v. Beloff Billiards, Inc., supra, quoting from Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840 (1972). "Plaintiff cannot create confidential trade secrets merely by entering into a nondisclosure agreement that claims information as proprietary." Take It Away, Inc. v. The Home Depot, Inc., 2009 WL 458552, at 7 (D. Mass. 2009).