

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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NATIONAL TRACTOR PARTS INC.,	)	Appeal from the Circuit Court of Kendall County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-L-45
	)	
CATERPILLAR LOGISTICS INC.,	)	Honorable
	)	Timothy J. McCann,
Defendant-Appellee.	)	Robert P. Pilmer,
	)	Stephen L. Krentz,
	)	Judges, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Presiding Justice Birkett and Justice Zenoff concurred in the judgment.

**OPINION**

¶ 1 Plaintiff National Tractor Parts (NTP) appeals from an order of the trial court granting summary judgment in favor of defendant, Caterpillar Logistics Inc. (CLI), denying NTP's request for additional discovery and striking its affidavits. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 NTP's pleadings in this case reflect that after 1973 but before it started working for CLI's parent company Caterpillar in 1986, NTP changed the way it performed the assembly process from a cell assembly process to a pulsed line assembly process. In a cell assembly process, multiple parts are brought to a single location for assembly. In a pulsed line assembly process, certain

components are assembled at one workstation and then the sub-assembly is moved to another workstation where specific additional parts are assembled. NTP alleged that this change in process resulted in increased levels of efficiency, quality control, and cost savings. NTP summarized its pulsed line assembly process into “build books” and other assembly aids that its employees used to perform their work. When NTP’s build books and other assembly aids were not being used by its employees to perform their work, those materials were kept inside a locked cabinet in a locked office in NTP’s dedicated work area located in a Caterpillar or CLI facility. NTP did not require its employees to sign confidentiality agreements; however, its employees were instructed that the build books and other assembly aids were the property of NTP and could not be shared with any other entity.

¶ 4 In 1986 Caterpillar hired NTP to assemble and repair track chain for Caterpillar’s truck-based products. In 1989, Caterpillar and NTP entered into the first of two purchase agreements. In those agreements NTP agreed to perform such services exclusively for Caterpillar. NTP also agreed that Caterpillar owned the component parts it provided to NTP to assemble, and NTP agreed to use them for assembling Caterpillar products exclusively. NTP also agreed to keep technical and business information it received from Caterpillar confidential.

¶ 5 In 2004, NTP expressed its desire to perform work for other customers in addition to Caterpillar. Therefore, it entered into a services agreement with CLI, a Caterpillar subsidiary that contracted with third-party suppliers to provide services to Caterpillar’s manufacturing facilities. At that time, NTP was building “sub-assemblies” for Caterpillar excavators and wheel loaders. “Sub-assemblies” were larger parts, such as valves, brake packs, and fuel tanks, made up of smaller component parts. NTP would use Caterpillar parts and instructions to put together sub-assemblies,

and Caterpillar would incorporate the sub-assemblies into its machines during the manufacturing process.

¶ 6 In the 2004 services agreements, CLI agreed to provide NTP with work instructions and standards, layouts, and visual assembly aids. It also agreed to help NTP with any assembly build questions. NTP agreed to hire hourly associates to perform assembly services and provide management supervision of the sub-assembly operations. The services agreement also contained confidentiality provisions that prohibited NTP from using information it learned or developed while performing services for CLI for any other purpose. Specifically, those provisions provided:

“9. Confidential Information.

(a) NTP may receive Confidential Information from Cat Logistics or create Confidential Information as a result of Services, and any such Confidential Information is and shall be owned by Cat Logistics. Except as required for the performance of Services hereunder, NTP shall not use or disclose to any third party any such Confidential Information. NTP agrees to take all necessary steps to protect any Confidential information with at least the same degree of care that NTP uses to protect its own confidential and proprietary information of like kind, but not less than reasonable care. NTP shall not use Confidential Information other than to perform Services in accordance with this Agreement. The obligation of confidentiality hereunder shall not apply to information that: (i) was already in the possession of NTP without restriction on its use or disclosure prior to the receipt of the information from Cat Logistics; (ii) is or becomes available to the general public through no act or fault of NTP; (iii) is rightfully disclosed to NTP by a third party without restriction on its use or disclosure; (iv) is independently developed by employees and/or consultants of NTP who have not had access to the Confidential

Information; or (v) is required to be disclosed pursuant to judicial or governmental decree or order, provided that Cat Logistics is given prompt notice of and opportunity to defend against disclosure pursuant to such decree or order.

(b) Upon completion of any Services all Confidential Information shall be promptly delivered to Cat Logistics.

(c) The requirements of Section 9(a) shall survive the termination of this Agreement for a period of five (5) years.

(d) For purposes of Section 9, "Confidential Information" means any design, specification, idea, concept, plan, copy, formula, drawing, procedure, business process, organizational data, customer or supplier lists, or other business or technical information that the disclosing party holds confidential or considers proprietary whether oral, written or viewed by inspection, that is obtained as a result of Services rendered by NTP to Cat Logistics in connection with this Agreement.

(e) On or before September 1, 2004, NTP shall obtain a written agreement in the form attached as Exhibit D, or other form acceptable to Cat Logistics, from each of its employees, subcontractors and agents. Upon request, NTP agrees to make such agreements available to Cat Logistics for inspection. NTP shall be liable for any failure by it, or its agents or subcontractors, or its or their employees to comply with Section 9."

Nothing in the services agreement referred to NTP using any secret or proprietary process to build Caterpillar's sub-assemblies.

¶ 7 NTP and CLI entered into a second services agreement in December 2005. The confidentiality provisions in the 2005 services agreement were identical to those in the 2004 agreement (although the 2005 and subsequent confidentiality provisions were now found in section

8.1 of the services agreements and not section 9 of the agreements). In both agreements NTP agreed to provide labor to perform assembly services, and CLI agreed to define expected work standards, provide visual assembly aids, and work with NTP to design the subassembly process.

¶ 8 NTP and CLI entered into a third services agreement in November 2007. The 2007 services agreement referred to NTP's move to the Aurora Logistics Center, a CLI facility across the street from Caterpillar's Aurora manufacturing plant. Regarding confidentiality, the 2007 agreement was materially identical to the previous agreements. However, the 2007 agreement added two new provisions. First, an express requirement was added that NTP perform services according to Caterpillar's "Standard Processes," which were defined as "Caterpillar Inc. standard processes and procedures required by Cat Logistics." Caterpillar's "Standard Processes" included the assembly processes for Caterpillar's sub-assemblies. The second provision governed NTP's use of the Aurora Logistics Center. CLI agreed to use "commercially reasonable efforts" to "designate and physically identify and/or delineate NTP's work area within the Aurora Logistics Center and to limit access to any CLI employees or agents "for whom access is required to perform the Services."

¶ 9 In January 2011, the parties entered into a fourth and final services agreement. The 2011 agreement contained the same provisions as the previous agreements regarding confidentiality, sub-assembly documentation, work standards, visual assembly aids, and working with NTP to "design the sub-assembly processes." That agreement also contained identical provisions as the 2007 agreement with respect to Caterpillar's Standard Processes and NTP's work area in the Aurora Logistics Center.

¶ 10 In August 2012, CLI informed NTP of Caterpillar's decision to use its own employees to build sub-assemblies. It told CLI that it would start moving the sub-assembly work in October 2012 and have a complete exit of all business before January 2014. In late August 2012, CLI began

preparations for transitioning sub-assemblies from NTP to Caterpillar. The wheel loader sub-assemblies were the first to be moved. CLI notified NTP that Caterpillar engineers would be visiting the Aurora Logistics Center to observe NTP employees perform their services. NTP replied that it would not be a good idea for CLI to observe the assembly process until the parties could come to an agreement on “severance” and the time frame for reducing services. However, in September 2012, NTP noted that it had allowed CLI unrestricted observation of its work by Caterpillar employees.

¶ 11 In an e-mail dated August 20, 2012, from a CLI employee, Jeff Kellogg, to the president of NTP, Christopher Gunier, Kellogg stated:

“As discussed in previous meetings, Caterpillar Inc. has made a strategic decision to in-source the work currently performed by National Tractor Parts (NTP). This reduction in business is expected to begin in October of 2012 and will result in a complete exit of all business before January of 2014. We do appreciate the 26 years of service and support NTP has provided to Caterpillar during this time. During this transition period it is Caterpillar’s expectation that both NTP and Caterpillar jointly work together to complete this transition.

We look forward to meeting with you to discuss this further.”

By the end of 2012, the wheel loader sub-assembly work had been completely transitioned to Caterpillar.

¶ 12 CLI also asked NTP for the build books for the wheel loader sub-assemblies. NTP initially objected to providing the build books and other assembly materials to CLI but then changed its mind, and in October 2012 it said that it was NTP’s “intention to try and respond as expeditiously and as reasonably possible to all requests.” Specifically, NTP wrote, “[a]fter evaluating the situation NTP has decided to hand over all 966L and 980L [wheel loader] material that we have in

our possession relating to the build books.” NTP continued to disclose build books to CLI, and CLI continued to observe NTP’s operations.

¶ 13 In January 2013, CLI began transitioning the excavator sub-assembly work. CLI again notified NTP that it would review the “processes, tools and standard work” for the excavators and observe NTP’s sub-assembly services. Although NTP objected to CLI’s presence in its work area, NTP took no steps to stop CLI from observing the sub-assembly process. In mid-March 2013, as the end of the services agreement neared, CLI asked NTP to identify any assets it wanted to move from the Aurora Logistics Center. In an internal asset list that NTP had prepared in connection with CLI’s request, an NTP employee noted that, regarding “[p]aperwork, Build Books, Ref. Guides,” those items were “[l]ocated in the various assembly areas. I figured you didn’t want them kept, but possibly destroyed.” NTP alleged that in March 2013, with more than a week of work still scheduled for NTP and its workers, Caterpillar’s security personnel suddenly and without warning converged on NTP’s designated area unannounced and immediately stopped all of NTP’s work and escorted all of NTP’s personnel out of the building. CLI then locked them out and forcibly took over possession of NTP’s designated space and its trade secrets located in that area.

¶ 14 On June 2, 2014, NTP filed a 13-count complaint against CLI, Caterpillar, and 10 of its employees. The gist of the complaint was that CLI breached the 2011 services agreement by reducing the services it purchased from NTP in the last year of the agreement. In addition, NTP brought a dozen other claims for fraudulent inducement, promissory estopped, nuisance, trespass, trespass to chattels, conversion, fraud, defamation, commercial disparagement, tortious interference with prospective economic advantage, unjust enrichment, and “misappropriation of NTP’s intellectual property, trade secrets, and other proprietary business information.” The trial court granted CLI’s motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure

(Code). 735 ILCS 5/2-615 (West 2014). It held in relevant part that the 2011 services agreements barred NTP's "misappropriation" claim. It explained that the confidentiality provision in the 2011 agreement "clearly and unambiguously provides" that anything NTP created as a result of performing services "shall be owned by Cat Logistics."

¶ 15 On March 31, 2015, NTP filed a first amended complaint. NTP only named CLI as the defendant and alleged fraud, violations of the Illinois Trade Secrets Act (Act) (765 ILCS 1065/1 *et seq.* (West 2014)), and defamation.

¶ 16 In the amended complaint NTP alleged that it had a trade secret "for assembling component parts and sub-assemblies" that was developed long before NTP began performing services for CLI. The trial court dismissed the fraud and defamation claims. However, it held that, if NTP could prove it developed a trade secret independent of its work for CLI, then the 2011 services agreement would not necessarily bar such a claim. Specifically, it held:

"This court previously found Section 8.1 to be sufficient to bar Plaintiff's trade secrets claim. However, Plaintiff's amended complaint contains new allegations including, among other things, that the disputed pattern/process was developed 'over the years, and prior to entering into the Services Agreement. . .'. Plaintiff accordingly argues that Section 8.1 does not preclude it from protecting its rights to the disputed pattern/process because it was not "created. . . as a result of Services," rather, it was created prior to the existence of the contract. Taken as true, these allegations are sufficient to survive a motion to dismiss on that particular issue."

¶ 17 In its initial response to written discovery NTP described its trade secret as follows:

"NTP developed patterns/processes to assemble the various component parts that it was hired to build. Please see NTP's complaint for a description of the patterns/processes,



a complaint that the Court found states a claim per Illinois’s fact-pleading standard under the Illinois Trade Secret Act. Examples of NTP’s patterns/processes are depicted in the build books and checklists produced by NTP in discovery; other build books and checklists that were confiscated by CLI during the lock-out are believed to be in the possession of [CLI] and/or Caterpillar.”

¶ 18 CLI moved to compel NTP to provide more detail about its alleged trade secrets, including what was misappropriated and any efforts NTP made to preserve its secrecy. The trial court granted CLI’s motion. NTP then added the following description of its trade secret:

“NTP’s trade secrets involve patterns and processes for assembling component parts and subassemblies. These patterns and processes when applied to the heavy equipment industry and companies such as Caterpillar include unique methods of converting heavy equipment assembly processes from what are called a “bay” or “cell” assembly processes to what are called a “pulsed line” assembly process, resulting in dramatically increased levels of efficiency, quality control, and cost savings. Generally, in a cell assembly process multiple parts are brought to a single transaction for assembly. In a pulsed line assembly process, certain components are assembled at one workstation and then the subassembly is moved to another workstation where specific additional parts are assembled. *NTP’s trade secrets, among other applications, involve unique methodologies for determining the most efficient ways to set up, monitor, and assure quality control for pulsed line assembly systems in the heavy equipment industry.* The processes include but are not limited to determining the most efficient number of workstations, the order of assembly, quality control methods, and cost minimization techniques. The build books and

checklists depict the patterns/processes resulting from the application of NTP's trade secrets to the projects undertaken at CLI." (Emphasis added.)

¶ 19 Later, NTP supplemented its description of its trade secret with the following "outline of general principles":

"Below is an outline of general principles that NTP used to develop and set up processes for any project after the initial consultation among [NTP principals] on how best to proceed with a job:

(1) Identify the project or process objective, *i.e.*, is it assembly, dis-assembly, re-work or product service;

(2) Focus on the following goals: (a) efficiency; (b) lowest cost; (c) insure quality; (d) safety factors; (e) transportation, shipping, delivery;

(3) Efficiency – what is the best method, cell, assembly line, hybrid;

(a) Determine workstation numbers, locate and properly organize workstations;

(b) Determine personnel requirement and apply to workstations

(c) Develop workstation procedures and aids;

(d) Determine material and work supplies location in relation to workstation.

Can the material be stored by the workstation? Can the material be kitted? What is the most effective material flow?

(e) What tooling or new technologies are available to achieve efficiency.

(f) Examine every assembly function and component to evaluate best practice to optimize assembly efficiency.

(4) Lowest cost – what methods can be applied to reduce costs?

Is it cost effective to convert cell assembly to assembly line set-up? This should increase daily production while reducing per unit cost and insuring better quality control. Evaluate best practices for material control and location. Is kitting material in advance cost effective to the process?

(5) Quality:

(a) Set up auditing procedures. Co-ordinate with assembly aids.

(b) Establish quality check lists for each station.

(c) Quality certification of completed product. Quality metrics and data accumulation and retention.

(6) Storage/Transportation:

(a) Crating or packaging requirements and can we supply?

(b) Do we have ability and space to temporarily store completed product on premises?

(c) Can we provide delivery to customer of finished product? This can be a critical component of the NTP process. It allows us more control of material and product rather than rely on outside transportation. This can provide better service to customers with JIT requirements.

(7) Communication and Supervisory & Management Interaction: How can we best utilize managers' knowledge and expertise? Hands on interaction with assemblers during process execution.”

¶ 20 On December 8, 2017, CLI filed a “renewed motion to compel” in which it argued that NTP had still not identified what specifically had been misappropriated and when the materials

had been created. The trial court agreed and ordered NTP to provide this information for a second time.

¶ 21 In response, NTP revised its spreadsheets that it had earlier provided to CLI in discovery. NTP produced two new spreadsheets, purportedly reflecting the assembly materials that CLI allegedly misappropriated. In reply, on February 8, 2018, CLI filed a motion to stay the proceedings pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). In that motion CLI requested that the trial court stay any further proceedings until NTP complied with discovery and identified its trade secret. The trial court granted the motion, and for the third time it ordered NTP to identify the specific materials that CLI allegedly misappropriated and when they had been created. In April 2018 NTP again produced another set of spreadsheets.

¶ 22 On July 9, 2018, CLI filed a motion for summary judgment pursuant to section 2-1005 of the Code. 735 ILCS 5/2-1005 (West 2018). In its motion CLI said that summary judgment was appropriate because NTP had not identified anything that could be deemed a trade secret and that CLI owned the materials it was accused of misappropriating. Specifically, it argued that it owned NTP's assembly processes under confidentiality provisions of the services agreements. CLI also argued that NTP could not establish the first element of a *prima facie* case under the Act, *i.e.*, that the information was secret, claiming it played a role in developing these processes and that NTP failed to take reasonable steps to protect those trade secrets when it allowed CLI employees and agents into its work area to view its employees performing that work.

¶ 23 In response, Christopher Gunier, NTP's president from the 1980s through 2013, filed a Rule 191(b) affidavit. Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013). In his affidavit Gunier said that there were material facts relevant to the issues raised in CLI's motion for summary judgment that were unavailable to NTP due to "hostility or otherwise." Gunier said that, in order to respond to CLI's

motion for summary judgment, NTP sought to depose three of CLI's current or former employees, Don Smith, Jeff Kellogg, and Kyle Johnson. All three of those individuals appeared in the multiple e-mails that CLI attached as supporting exhibits to its motion for summary judgment. NTP expected that those individuals would testify to the issues raised in CLI's motion for summary judgment, specifically, the ownership of CLI's processes, whether those processes were unique, and the steps NTP took to keep those processes secret, including negotiating a dedicated work area. Finally, Gunier averred that affidavits could not be procured from Smith, Kellogg, or Johnson because they were represented by CLI's counsel.

¶ 24 CLI filed an opposition to NTP's request. Specifically, it argued that (1) NTP failed to identify any facts that it believed the deponents would testify to or reasons for its belief, as required by Rule 191(b), (2) any testimony about the negotiation of the services agreements would be barred by the parol evidence rule, and (3) any information about the existence of a trade secret, including whether it was "unique" or the steps NTP took to keep it secret, would necessarily be in NTP's possession.

¶ 25 In ruling on NTP's request for discovery pursuant to Rule 191(b), the trial court held in part:

“[Y]ou are required to tell me in the affidavit why these facts are known only to the persons whose affidavits you are unable to procure. And it seems to me that ownership of the process, whether that is unique and what steps your client took to keep these processes secret, would be in the knowledge of the plaintiff.

[C]ertainly if your client developed a unique process, your client should know that and be able to provide their own affidavit. You should not have to rely on the affidavits of

the defendants. So, I do not believe that your affidavits or 191(b) entitles you to take that discovery, so I'm going to deny that request.”

¶ 26 On September 20, 2018, NTP filed a response to CLI's motion for summary judgment and a “Renewed Rule 191(b) Motion to Conduct Discovery.” Attached to the response were affidavits from Michael Gunier, NTP's product manager and developer of its trade secret process and assembly materials; two NTP supervisors, Chuck Sites and Kale Duffy; and Dr. Alan Goedde, an expert in the field of trade secrets development and security. In Dr. Goedde's affidavit he said that, based upon his experience as an expert in trade secret matters, his review of the materials provided to him, and his conversations with NTP management, he believed to a reasonable degree of certainty that NTP took reasonable steps to secure the secrecy of its trade secrets while performing sub-assembly functions for Caterpillar and CLI.

¶ 27 CLI filed a motion to strike substantial portions of those affidavits as being in violation of Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). On October 26, 2018, the court held a hearing on CLI's motions. At the hearing CLI's counsel argued that the evidence showed that CLI had not misappropriated any trade secrets from NTP. Specifically, counsel noted that NTP had produced spreadsheets in discovery that listed the exact materials that CLI had allegedly misappropriated. When one held that evidence up against the time frame that NTP started building classes of sub-assemblies and compared it to when those pieces of Caterpillar equipment came into existence, one could see that, for virtually all the materials at issue, they were created after 2004 when the services agreements vested ownership in those materials to CLI. Counsel then removed the materials for which the related Caterpillar excavators and wheel loaders did not exist after the services agreements went into effect. For the handful of materials that remained, CLI argued, they could not be a trade secret by virtue of NTP's purchase agreements with Caterpillar.

¶ 28 During the hearing, Judge McCann asked NTP to identify its alleged trade secret. In response, counsel for NTP stated that it was only claiming trade secrets in its “general principles.” The following colloquy then occurred:

“THE COURT: Okay, well, let me interrupt you for a second. Tell me—can you tell me specifically what is the trade secret that CAT Logistics misappropriated? Is it the build book, is it the actual process of the way components are attached, is it this pulsed line assembly system, is it the assessment tool that you use? What is the trade secret?”

MR. DUNN [NTP’s counsel]: The trade secret is the process for doing the sub-assembly work.

THE COURT: So, it’s the physical method of attachment of components?

MR. DUNN: It is figuring out how to—

THE COURT: Well, that’s different. Figuring out how to and doing it are two different things.

MR. DUNN: Well, but not really because what they’re doing here is, they’re saying build this radiator. And NTP has unskilled labor to do that work. If I’m skilled in legal argument, but if you asked me to build a radiator, I’d have no idea how to do it. They—the Guniers figured out how can we make these radiators quickly, cost effectively, and efficiently as possible. Well, here’s what you do, you have [one person] over here putting together parts A, B, C and D, you got [another person] then putting together D, E, F and G. You put—that’s how they figured it out. And then in order to train guys like us that wouldn’t know how to do it, they created these build books and assembly aids that were effectively checklists or visual aids to help them perform the work. But the work, the effort that they put into the trade secret process is what was taken.

THE COURT: So, it's the organization of the assembly process?

MR. DUNN: Correct.”

¶ 29 After having heard the parties' arguments the court took the motions under advisement.

¶ 30 On November 28, 2018, the trial court issued a written order granting CLI's motion for summary judgment and its motion to strike portions of NTP's affidavits. With respect to the affidavits, the court noted that Illinois Supreme Court Rule 191(a) provides that “affidavits shall not consist of conclusions, but of facts admissible in evidence” and “must be based upon the personal knowledge of the affiant.” The court struck virtually all the challenged paragraphs in NTP's affidavits.

¶ 31 Regarding CLI's motion for summary judgment, the trial court found that NTP's “general principles” were too general to be deemed a protected trade secret. It said that the factors NTP considered when it developed a plan to create sub-assemblies—namely, efficiency, cost, and quality—were topics that were likely considered by every company that developed an assembly or sub-assembly process. Moreover, the court held, the undisputed evidence showed that CLI owned the materials that it was accused of misappropriating. Specifically, the contract between CLI and NTP contained a provision that CLI in fact owned, and therefore could not misappropriate, any secret processes that were created while NTP worked for CLI. The court continued:

“NTP asserts that it had developed its trade secret process prior to the current contract, but the evidence does not support such a finding. In fact, the evidence points to the contrary. The vast majority of NTP's work, which predated the written agreement at issue, could not have been the basis for its current claims as the machines for which it claims the trade secret did not exist in large scale, if any, construction prior to the adoption of the agreement.



However, even if it is true that NTP created its trade secret prior to the effective date of the written agreement, it still has not been able to articulate what the trade secret is.

Generic use of terms such as ‘evaluation of a process based on efficiency, cost and quality’ is insufficient to merit trade secret protection.”

¶ 32 The court concluded by saying that, even if it were to find that a genuine issue of material fact existed, which it did not, Caterpillar<sup>1</sup> argued that NTP took insufficient steps to protect the information that it claimed was a trade secret. It noted that the efforts expended by NTP to protect the alleged trade secret consisted of telling two of its employees not to disclose the information, locking up the build books at night, and protecting the information stored on Caterpillar’s computer network by means of a password. The court found that a genuine issue of material fact existed as to whether NTP took reasonable steps, for a business of its size, to maintain the secrecy of the information at issue. Further, if NTP had established the existence of a material fact as to the steps it took to protect the secrecy of its alleged trade secret, it still must prove that it was damaged by the alleged misappropriation. The court found that, based upon the matters presented, it appeared that NTP suffered little, if any, damages due to Caterpillar’s alleged misappropriation. Notwithstanding the minimal nature of such damages, however, it held that a genuine issue of material fact existed as to whether NTP was damaged by Caterpillar’s actions. For all those reasons, the court held that summary judgment in favor of CLI was appropriate based upon NTP’s inability to establish that it possessed a trade secret that CLI then misappropriated.

¶ 33 NTP timely appealed.

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<sup>1</sup> The trial court said “Caterpillar” several times in making its ruling, but we can assume it meant CLI.

¶ 34

## II. ANALYSIS

¶ 35 On appeal, NTP argues that the trial court erred when it (1) denied its discovery request pursuant to Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013); (2) struck portions of its affidavits that it filed in response to CLI's motion for summary judgment, in violation of Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) ; and (3) granted summary judgment in favor of CLI. We will first address NTP's claim that the trial court erred in granting CLI summary judgment.

¶ 36

### A. Summary Judgment

¶ 37 NTP argues that the trial court erred in granting CLI's motion for summary judgment when there was clearly a genuine issue of material fact as to whether CLI violated the Act when it misappropriated its trade secret. Specifically, it contends that (1) the trial court erred when it found that the first element of the claim, whether it had a trade secret, was too general and that NTP's processes consisted of several factors that "are likely considered by every company that develops an assembly or sub-assembly process" and (2) NTP owned its own process and not CLI.

¶ 38 Summary judgment may be granted when the pleadings, depositions, admissions, and affidavits, viewed in the light most favorable to the nonmovant, fail to establish that a genuine issue of fact exists, therefore entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2018); *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 34. The party moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The movant may meet its burden of proof either by affirmatively showing that some element of the case must be resolved in its favor or by establishing " 'that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). " 'The purpose of summary judgment is not to try an issue of fact but \*\*\* to determine whether a triable issue of fact exists.' " *Schrager v.*

*North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). While a plaintiff does not need to prove its entire case during summary judgment, it must present some evidentiary facts as support for its cause of action. *Brettman v. M&G Brokerage, Inc.*, 2019 IL App (2d) 180236, ¶ 28. If a plaintiff fails to establish one element of the cause of action, summary judgment in favor of the defendant is appropriate. *Id.* (citing *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1085 (2009)). In reviewing the circuit court’s grant of summary judgment, we review the judgment *de novo*, and we may affirm on any grounds found present in the record. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24.

¶ 39 The Act defines a trade secret as follows:

“(d) ‘Trade secret’ means information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that:

(1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.” 765 ILCS 1065/2 (West 2018).

¶ 40 In order to establish improper use of trade secrets, a plaintiff must show “(1) a trade secret existed; (2) the secret was misappropriated through improper acquisition, disclosure, or use; and (3) the owner of the trade secret was damaged by the misappropriation.” *Liebert Corp. v. Mazur*, 357 Ill. App. 3d 265, 281 (2005).

¶ 41 A court should consider the following six factors in determining whether a trade secret exists: the extent to which the information is known outside of the plaintiff’s business, the extent

to which it is known by the employees and others involved in the plaintiff's business, the extent of measures taken by the plaintiff to guard the secrecy of the information, the value of the information to the plaintiff and to the plaintiff's competitors, the amount of effort or money expended by the plaintiff in developing the information, and the ease or difficulty with which the information could be properly acquired or duplicated by others. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 740 (2009) (citing *ILG Industries, Inc. v. Scott*, 49 Ill. 2d 88, 93 (1971)); see also Restatement (First) of Torts § 757 (1939).

¶ 42 1. NTP's "Trade Secret" Pursuant to the Act

¶ 43 NTP first contends that the trial court erred in finding that its process was not a protectable trade secret when it failed to cite or analyze the definition of a trade secret in the Act. Instead, it notes that the court cited a pre-Act case from 1973 in its order.

¶ 44 This argument has no merit. As we have noted, we review the trial court's grant of summary judgment *de novo*, and we may affirm on any grounds found present in the record. *Coughlan*, 2013 IL App (1st) 120891, ¶ 24. Therefore, we are not concerned with any case that the trial court cited in its order. We also fail to see how the trial court's definition of a trade secret as set out in its order, "a secret plan or process, tool, mechanism or compound," differs in any material way from the definition of a trade secret in the Act.

¶ 45 NTP next argues that "[n]on-technical data, like a customer list, which is nothing more than a list of names, can constitute a trade secret." We agree with CLI that simply because a list of names *can* constitute a trade secret does not mean that every list of names *is* a trade secret. Likewise, even if some nontechnical data can be considered a trade secret, this is not evidence here that NTP's "non-technical data" constituted a trade secret.

¶ 46 Instead, the Seventh Circuit Federal Court of Appeals has also provided guidance on the issue of whether a trade secret existed under the Act. Specifically, it has held that “[i]t is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated. The plaintiff must show concrete secrets.” *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1266 (7th Cir. 1992). Also, “[a] plaintiff must do more than just identify a kind of technology and then invite the court to hunt through the details in search of items meeting the statutory definition.” *IDX Systems Corp. v. Epic Systems Corp.*, 285 F.3d 581, 584 (7th Cir. 2002). Since NTP only pointed to broad areas and not concrete trade secrets, we find that this argument has no merit.

¶ 47 NTP also contends that it possesses a trade secret based upon the six-factor test set out in the First Restatement of Torts. See Restatement (First) of Torts § 757 (1939). It notes that in its written order the trial court found that it had presented evidence as to the second and third factors but erred when it found no evidence of factors one, four, five, and six.

¶ 48 Under that test, the following factors bear on the existence of a trade secret: (1) the extent to which the information is known outside of the plaintiff’s business, (2) the extent to which it is known by the employees and others involved in the plaintiff’s business, (3) the extent of measures taken by the plaintiff to guard the secrecy of the information, (4) the value of the information to the plaintiff and to the plaintiff’s competitors, (5) the amount of effort or money expended by the plaintiff in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement (First) of Torts § 757 (1939); see also *ILG Industries, Inc.*, 49 Ill. 2d at 93.

¶ 49 We are not persuaded that factors one, four, five, and six of the Restatement test aid NTP’s claim that it possesses a trade secret under the Act. Regarding factor one, “the extent to which the

information is known outside of the plaintiff's business," NTP contends that, as Michael Gunier explained in his affidavit, NTP performed assembly work for Caterpillar for decades, to the exclusion of Caterpillar's own workers or any competitors, and the process it developed was sufficiently secret to obtain economic value for its use. It maintained the secrecy of this process by, "*inter alia*, requiring it to be provided a dedicated workspace." However, that "dedicated workspace" was in Caterpillar's own facility, and it is undisputed that Caterpillar would observe NTP working in that space, even if NTP objected to Caterpillar's presence. Other than having a dedicated workspace, NTP does not give any examples as to how it maintained the secrecy of its process, simply choosing to say, "*inter alia*," it required a dedicated workspace. More important, in the services agreement NTP expressly agreed (1) to work with CLI to "design the sub-assembly process," (2) to provide services in accordance with Caterpillar "Standard Processes," including "Standard Work," (3) that its services would be audited for the level of compliance with Standard Work, and (4) that CLI could access NTP's work area in connection with the subassembly process. This evidence clearly contradicts NTP's claim that its processes were only known to itself. See *Del Monte Fresh Produce, N.A. v. Chiquita Brands International, Inc.*, 616 F. Supp. 2d 805, 820 (N.D. Ill. 2009) (the Illinois courts that have addressed this issue have consistently held that information that is disclosed by a business to its customers does not constitute secret information protected by the Act).

¶ 50 The fourth factor, "the value of the information to the plaintiff and to the plaintiff's competitors," cannot aid NTP when it fails to explain what its trade secret is except in the most general terms. If NTP cannot explain its trade secret other than in the most very general terms, then we cannot assess the value of that secret.

¶ 51 The fifth factor, “the amount of effort or money expended by the plaintiff in developing the information,” also weighs against NTP. Here, NTP argues that its trade secret was developed over time and discusses the “thousands of hours spent and the revenue earned by NTP and its predecessor companies beginning in 1973 as the trade secrets<sup>[2]</sup> were developed, refined, and applied to projects undertaken by NTP at the request of its clients.” It then lists its labor costs that it charged to customers from 1975 to 1986. None of this information, however, specifically explains the amount of effort or money expended on this amorphous “trade secret.”

¶ 52 Finally, the sixth factor, the “ease or difficulty with which the information could be properly acquired or duplicated by others” does not help NTP here. As we have noted, CLI was entitled under the services agreements to observe the sub-assembly process, and it even had the right to audit the process to ensure that it complied with CLI’s Standard Work. We do not find that NTP’s claim that its development of its “process” over decades, coupled with the fact that CLI started sending agents to observe NTP workers before terminating the contract and locking them out, is evidence that NTP’s process could not be easily acquired or duplicated. Accordingly, this factor also fails.

¶ 53 Here, NTP was given several opportunities to more specifically describe its trade secret for the trial court, and it failed to do so. We agree with the court that the NTP’s description of its “trade secret,” a process that focused on efficiency, cost, quality, safety, and transportation, contained generic terms that many companies would use to describe their assembly processes.

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<sup>2</sup> At times NTP refers to its “trade secret” and other times as its “trade secrets.” Likewise, it refers to both a “process” and “processes.”

Therefore, we find as a matter of law that NTP's process does not qualify as a trade secret under the Act.

¶ 54 2. Ownership of NTP's "Trade Secret"

¶ 55 Next, NTP claims that the trial court erred when it found that CLI did not misappropriate NTP's process by virtue of the confidentiality provision in the services agreement that states, "[NTP] may receive Confidential Information from [CLI] or create Confidential Information as a result of Services, and any such Confidential Information is and shall be owned by [CLI]." NTP argues that a reasonable jury could find that that provision did not apply here for three reasons: (1) NTP created its process for performing sub-assembly work long before CLI or any of the services agreements existed; (2) the *de minimis* updates that NTP made after 2004 to the build books and assembly aids did not trigger that contractual language; and (3) NTP's assembly materials, including the post-2004 updates and other assembly materials, were based upon public information.

¶ 56 We agree with CLI that the record does not support NTP's claim that it owned its process and not CLI. First, we reject NTP's claim that it created its process for performing sub-assembly work long before CLI or the services agreements existed. The trial court found, and we agree, that the undisputed evidence showed that the materials CLI allegedly misappropriated, the build books, were created "as a result of Services," therefore giving CLI ownership of the materials. The best evidence of CLI's ownership of the build books is from two of the spreadsheets that NTP itself created, one for wheel loaders and the other for excavators. In those spreadsheets NTP listed the assembly materials that CLI allegedly misappropriated by sub-assembly name, product model, and the date that NTP created the materials. CLI then supplemented NTP's spreadsheets with the dates that Caterpillar manufactured the products that NTP had identified. We agree with CLI that it is



indisputable that CLI owns the materials NTP accused it of misappropriating.

¶ 57 As for the build books that NTP allegedly created before 2004, it is undisputed that most of the underlying products for which they were created did not exist until 2004 or later, and none of them went into full production until 2005 at the earliest. Therefore, any build books for those sub-assemblies must have been created after the first services agreement went into effect. Therefore, even those build books were owned exclusively by CLI.

¶ 58 With regard to any products manufactured before 2004, even if NTP created build books for sub-assemblies for those products, those build books could not be considered a trade secret because the purchase agreements with Caterpillar at that time limited NTP's use of Caterpillar components to be "only for assembling Products for [Caterpillar]" and specifically barred NTP from using any of Caterpillar's business or technical information for its own purposes.

¶ 59 As for the handful of build books allegedly made in 1996, 1997, and 2001, the manufacturing data in the record shows that the relevant products were no longer built after 2003. Therefore, we fail to see how these products would have economic value at the time they were allegedly misappropriated 10 years later. Also, as we have noted, NTP's purchase agreements with Caterpillar barred NTP from using any information it received from Caterpillar for its own purposes—including creating "trade secrets" of its own. As for the materials for which NTP did not provide a date of creation, manufacturing data showed that the underlying products were not made until 2010 or 2011, years after the services agreements were in effect.

¶ 60 More important, however, is the fact that there was nothing "secret" about the build books. The sample build book submitted to the trial court shows that the "books" are simply pictures of Caterpillar sub-assemblies with part numbers. This is hardly "secret" information. Also, even if it had been secret information, the evidence showed that NTP *disclosed* those materials to CLI. NTP

gave CLI the build books for the wheel loaders during the transition of those sub-assemblies in fall 2012, and NTP gave CLI the build books for the excavators during the transition of the sub-assemblies in 2013.

¶ 61 We are also not persuaded by NTP's argument that the *de minimis* updates that NTP made after 2004 to the build books and assembly aides did not trigger the contractual language in the services agreements. There is no evidence in the record to support this assertion. NTP only points to Gunier's affidavit in support of this assertion; however, in his affidavit Gunier did not identify what changes were made or any basis for NTP's assertion that the changes were minor.

¶ 62 Third, NTP claims that the services agreements do not apply because the "blueprints and other technical information provided by Caterpillar and CLI" used to create build books were publicly available and that "the Services exclude[d] that type of public information from its scope." We disagree. As CLI points out, NTP again refers to Gunier's affidavit where he simply states, without any factual support, that the information contained in Caterpillar's "blueprints and other technical information" was available to the public through books and service manuals. However, Gunier did not support his allegations with any facts that the same information in Caterpillar's blueprints could be found in publicly available documents. Also, even if this information *were* to be determined to be public information, the services agreements defined "Confidential Information" as both confidential *and* proprietary. NTP does not dispute that the blueprints were proprietary to Caterpillar.

¶ 63 B. Violations of Illinois Supreme Court Rule 191

¶ 64 NTP also argues that the trial court erred when it denied it discovery as provided for under Rule 191(b). It also claims that the trial court violated Rule 191(a) when it struck substantial

portions of three affidavits that NTP submitted in response to CLI's motion for summary judgment. We shall address each claim individually.

¶ 65 1. Illinois Supreme Court Rule 191(b)

¶ 66 NTP contends that CLI argued in its motion for summary judgment that NTP could not establish the first element of its claim under the Act, the existence of a trade secret. Therefore, it claims that since this type of motion is a "*Celotex*-type of motion" it did not have to strictly comply with Rule 191(b).

¶ 67 Rule 191(b) allows a party defending against a motion for summary judgment to submit an affidavit in response. More specifically, the rule provides that if such an affidavit

“contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion.” Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

¶ 68 There are two recognized ways that a defendant can succeed in obtaining summary judgment as a matter of law: (1) by affirmatively disproving an element of the nonmovant's case and (2) by establishing that the nonmovant's evidence is insufficient to avoid summary judgment

as a matter of law. *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 25. A “*Celotex*-type motion” is a term derived from *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and describes the former type of summary judgment motion. *Jiotis*, 2014 IL App (2d) 121293, ¶ 25. When a defendant files a “*Celotex*-type motion,” strict compliance with Rule 191(b)’s affidavit requirement is not automatically necessary, whereas strict compliance is required with a traditional motion. *Id.* ¶ 26.

¶ 69 This court reviews a trial court’s decision to deny a Rule 191(b) motion for discovery under an abuse of discretion standard. *Id.* ¶ 23. A trial court abuses its discretion only when no reasonable person would accept the view adopted by the trial court. *Janda v. U.S. Cellular Corp.*, 2011 IL App (2d) 103552, ¶ 96.

¶ 70 We agree with CLI that NTP did not file a “*Celotex*-type motion” that justified noncompliance with Rule 191(b) because CLI affirmatively showed that NTP did not possess a protectable trade secret. Instead, CLI moved for summary judgment because, *after four years and three orders to compel*, it was abundantly clear that NTP could not identify any trade secret here. Therefore, it was not entitled to depose three CLI employees in order to find out if they had information about *NTP’s alleged trade secret*. For these reasons, we find that the trial court did not abuse its discretion in denying NTP’s request for discovery under Rule 191(b).

¶ 71 2. Illinois Supreme Court Rule 191(a)

¶ 72 Finally, NTP contends that the trial court violated Rule 191(a) when it struck portions of the affidavits of three NTP employees: Kale Duffy, Chuck Sites, and Michael Gunier.

¶ 73 Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) provides, in pertinent part, that affidavits submitted on summary judgment

“shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.”

When a trial court rules on a motion to strike affidavits in conjunction with a motion for summary judgment, we review the court’s ruling on the motion to strike the affidavits on a *de novo* basis.

*Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 18.

¶ 74 a. Affidavits of Kale Duffy & Chuck Sites

¶ 75 NTP argues that the trial court erred in striking the following paragraph from Duffy’s and Sites’s affidavits:

“The [NTP] build books and assembly aids were essential to allow me to perform my work. I was not able to perform my work by reviewing the Standard Work or other material provided by Cat Logistics or Caterpillar.”

¶ 76 Here, the trial court properly struck these paragraphs from the affidavits for several reasons: (1) the affiants failed to set forth their qualifications to testify about the build books and Standard Work; (2) neither affiant described his job duties, the type of work he performed for NTP, or the basis of his personal knowledge of how the build books were used; and, most important, (3) the affidavits were completely conclusory. Neither affidavit explained why the build books were essential to their work or why they could not work simply by using the Standard Work or other materials provided by CLI.

¶ 77 b. Affidavit of Michael Gunier

¶ 78 NTP argues that the trial court erred in striking various portions of Michael Gunier’s affidavit. In doing so, NTP summarizes the portions of Gunier’s affidavit that the trial court struck for violation of Rule 191(a) and then claims that “[a]ll of the information in Mr. Gunier’s affidavit was based upon his personal knowledge. Viewing his affidavit ‘as a whole’ there is a reasonable inference that [he] could competently testify to its contents at trial.”

¶ 79 We agree with CLI that NTP’s argument here is just as conclusory as the portions of Gunier’s affidavit that it attempts to defend. We find that an overwhelming majority of Gunier’s statements were conclusory, in violation of Rule 191(a). Moreover, we find that there is nothing in this stricken testimony that makes the allegations of the existence of a trade secret more concrete.

¶ 80 For all these reasons, we find that the trial court did not err in striking portions of Duffy’s, Sites’s, and Gunier’s affidavits as violating Rule 191(a).

¶ 81 **III. CONCLUSION**

¶ 82 In sum, we affirmed the trial court’s order granting CLI’s motion for summary judgment when we found that NTP’s description of its “trade secret” was too general to be deemed a trade secret under the Act as a matter of law. The trial court also properly denied NTP’s request for discovery pursuant to Rule 191(b), when its request came after four years of litigation, and its request was to depose three CLI employees to prove that it possessed a trade secret, something that it should have been able to prove from its own sources. Finally, we found no violation of Rule 191(a) when the trial court struck several portions of the affidavits of three NTP employees when their testimony was conclusory in nature. For all these reasons, we affirm the trial court’s order granting CLI’s motion for summary judgment, denying NTP’s request for additional discovery, and striking portions of NTP employees’ affidavits.

¶ 83 The judgment of the circuit court of Kendall County is affirmed.

¶ 84 Affirmed.

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**No. 2-18-1056**

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**Cite as:** *National Tractor Parts Inc. v. Caterpillar Logistics Inc.*, 2020 IL App (2d) 181056

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**Decision Under Review:** Appeal from the Circuit Court of Kendall County, No. 14-L-45; the Hon. Timothy J. McCann, the Hon. Robert P. Pilmer, and the Hon. Stephen L. Krentz, Judges, presiding.

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