

NOT DESIGNATED FOR PUBLICATION

ID CARD CENTER, INC.	*	NO. 2009-CA-0929
VERSUS	*	
NORMA ROBLES NISSAN, ET AL.	*	COURT OF APPEAL
	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2007-14493, DIVISION "L-6"
Honorable Kern A. Reese, Judge

Judge Dennis R. Bagneris, Sr.

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard, and Judge Paul A. Bonin)

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DECEMBER 30, 2009

AFFIRMED

In this suit for injunctive relief, defendants/appellants Norma Robles Nissan, Andrea Fabiola Robles de Medina, Guillermo Robles and Incometaxes Center, LLC, argue that the trial court erred in (1) carrying out this Court's instructions on remand following supervisory review of the trial court's original preliminary injunction and (2) granting a second preliminary injunction in favor of plaintiff/appellee ID Card Center, Inc. Our review of the record and applicable law leads this Court to the conclusion that the plaintiff, ID Card Center, Inc. is entitled to a preliminary injunction pursuant to Louisiana's Unfair Trade Practices and Consumer Protection Law (LUTPL), La. R.S. 51:1401 et seq. and Louisiana's Unfair Trade Secrets Act, La. R.S. 51:1431 et seq., for the reasons detailed below. Accordingly, we hereby affirm the judgment of the trial court.

FACTS AND PROCEDURAL BACKGROUND

On November 6, 2007, ID Card Center, Inc., (hereafter "Card Center") filed a petition for damages and injunctive relief against defendants. Card Center alleged in its petition that from 2002 to the time the petition was filed, it was engaged in the business of selling identification cards in Louisiana, particularly in Orleans, Jefferson and St. Tammany parishes, as well as "other places," and in

Houston and Nacogdoches, Texas. Card Center alleged that in early 2002 through 2003, it developed a unique product as a result of its labor, skill, industry and expense. That unique product consisted of the logos, fonts, formatting and watermarked lamination of its cards, features that made its cards wholly different from those of its competitors. To create its unique product, Card Center maintained customized software templates and other electronic data, such as its business forms that it kept on computers located in its office in Kenner, Louisiana.

Card Center alleged that it hired defendant Norma Robles Nissan (“Norma Nissan”) as a worker in 2002, and as an agent in August 2005; defendant Andrea Fabiola Robles de Medina (“Medina”) as an agent in September 2006; and defendant Guillermo Robles as an agent in July 2004. When the three individual defendants became engaged as agents for Card Center, they entered into separate written agreements not to compete, either directly or indirectly, with Card Center in the parishes of Jefferson, Orleans, St. Charles, St. Bernard, St. Tammany and Jefferson Davis for a period of “twenty [sic] (24) months” after the termination of their agency with Card Center.

Card Center alleged that the three individual defendants secretly contrived a plan and scheme to take its proprietary electronic data, customer lists and proprietary methods on how to prepare Card Center’s unique product. Allegedly in late 2006, Medina gained access to a computer containing Card Center’s proprietary data and learned the special methods of preparing its product by deceiving a Card Center employee into believing that Card Center’s president and sole stockholder, Cristina Cali, had given Medina permission to copy the data and be shown such special manufacturing methods. Card Center also alleged that Medina stole several proprietary business documents, including the written non-

compete agreements between defendants and plaintiff. Shortly after these acts, the three individual defendants terminated their agency with Card Center, and Medina subsequently shared Card Center's stolen proprietary information with defendants Norma Nissan and Guillermo Robles, and they each began creating identification cards with the identical style and appearance of Card Center's cards.

Card Center contends that from December 2006 onward, the three individual defendants began making the cards and using advertisements directed to Card Center customers and designed to confuse its customers in Orleans and Jefferson parishes. On or about May 10, 2007, Norma Nissan created Incometaxes Center, LLC to make and market the cards. Card Center alleged that from December 2006 onward, (from May 2007 onward in the case of defendant Incometaxes Center, LLC,) defendants began using business forms and electronic data stolen from Card Center to create their own forms which are nearly identical to Card Center's forms, causing confusion among Card Center's customers and agents, depriving it of profits, and intentionally thwarting Card Center's activities by contacting Card Center's other agents to persuade them to breach their respective non-compete agreements with Card Center.

Card Center claimed that the uniqueness of its product gave it an advantage over its competitors, earning it significant profits over the years. It alleged that at all times it kept the knowledge of its methods of preparing its unique products a trade secret, restrictively disclosing such secrets and allowing access to the computers containing the proprietary electronic data to some of its workers, each of whom was contractually bound to keep the methods confidential. Card Center further claimed that it also developed unique advertising to market its product. The advertising was unique in the logos, photographs, and appearance of its

printed advertising, which was published in several Spanish-language newspapers in the parishes where Card Center did business. Card Center claimed it maintained a list of customers, which it kept as a trade secret, disclosing the list only to some of its workers, each of whom was contractually bound to keep the list confidential.

Card Center's owner alleged that she attempted to avoid the confusion caused by defendants' actions by changing the styles of Card Center's products and advertising, but defendants subsequently modified the styles of their products and advertising, making them identical to Card Center's, with the intent to continue the confusion.

Card Center asserted causes of action for breach of contract, tortious interference with contract/business relations, and unfair trade practices; and sought preliminary and permanent injunctions prohibiting defendants from using cards, advertisements and forms identical to Card Center's products.

Following a hearing, the trial court issued a preliminary injunction on April 16, 2008, in favor of plaintiff and against the four defendants, enjoining them from competing with Card Center; interfering with any customers, agents or personnel of Card Center; or interfering with the contractual relations of any customer, sales person, agent or independent contractor earning commissions from Card Center. The order enjoins defendants from operating their business, or preparing and selling identification cards in the State of Louisiana. The order enjoins defendants from using any of the knowledge gained in their relationship with Card Center for any purpose, and enjoins them from giving such knowledge to any other party or entity, particularly the names or any other information regarding any of Card Center's customers "in any sales effort of any type whatsoever." The order enjoins defendants from using identically styled cards, advertisements and forms as Card

Center. Finally, the order enjoins defendants from “destroying, hiding or otherwise tampering with their own electronic data and computers.” On November 13, 2008, defendants filed a motion to dissolve the preliminary injunction, which the trial court denied. Thereafter, defendants filed an application for supervisory review with the Court, as well as an appeal.

On March 18, 2009, this Court granted defendants’ writ application (2009-C-0022) and stated as follows:

We find that the trial court erred in denying defendants’ motion to dissolve the preliminary injunction insofar as it was based on the purported non-compete agreements or any other part of the agent agreement. The non-compete clauses of the agent agreements that plaintiff alleges were signed by the individual defendants are null and void because they exceed in duration the two-year limitation imposed by La. R.S. 23:921(C). The entire agent agreements, including the non-disclosure clauses, are null and void by virtue of the defective non-compete clauses, given that the agent agreements contained no severability clauses. (citation omitted)....

In the event that the issuance of the preliminary injunction was not based solely on the non-compete clauses in the agent agreements, we are remanding this matter to the trial court to reform its order granting a preliminary injunction, if possible, to remove any parts of it that were based on any part of the agent agreement, including the non-compete and non-disclosure clauses, and to conduct a hearing to fix security to be posted by plaintiff for a preliminary injunction, if a new order granting preliminary injunction is entered.

On March 25, 2009, defendants filed an ex parte motion for immediate dissolution of the original preliminary injunction, which the trial court denied. After a contradictory hearing on April 2, 2009, the trial court granted a second preliminary injunction, which enjoins defendants from “using any proprietary information obtained while employed at ID Card Center Inc., including any names or any other information regarding plaintiff’s customers in any sales effort,” “from

using identically styled cards, advertisements and forms as ID Card Center Inc.,” from “destroying or tampering with their electronic data and computers.”

In its reasons for judgment, dated April 22, 2009, the trial court stated, in pertinent part:

Non-Compete Agreement

Plaintiff argues that the paragraphs 1, and 2 of the initial preliminary injunction were based on the non-compete agreement and not the agency agreement the Fourth Circuit based its decision on. But, assuming arguendo that plaintiff’s correct, this Court finds that the non-compete agreement supplied to it by plaintiff has lapsed. This agreement was allegedly signed on January 10, 2005. ... It was to remain in effect for 24 months after defendant employee left plaintiff’s employ. Defendants left in December 2006. The agreement has lapsed. At this point in time, defendants can compete in the ID card business.

Unfair Trade Secret

In the alternative, plaintiff argues that paragraphs 3, 4, and 5 should be sustained because they refer to defendants’ violation of Louisiana’s unfair trade practices. For the Court’s purpose, the threshold question to be answered is whether legally protectable trade secrets exist. (citation omitted). Moreover, determining what constitutes an LUTSA violation involves a balancing process between the right of an employee to individual freedom and the right of an employer to **honest** and **fair** competition and protection of business assets (trial court’s emphasis). (citation omitted).

* * *

The plaintiff argues that defendants stole the information from it and used it to make nearly identical ID cards and advertisements, which in turn caused confusion in the market. The defendants have vigorously asserted that plaintiff’s trade secrets are nothing more than techniques and information that are available to the general public. Defendants also argue that plaintiff’s advertisements are not trade secrets either because they are in the public domain.

The Court believes the question to answer is whether or not there was honest and fair competition. Defendants' objections are understandable. If they had gone out purchased the equipment, the templates, and fonts the Court may have concluded differently. Honest and earnest competition is the hallmark of a vibrant market economy. The Court is concerned with the means in which defendants acquired their manufacturing capabilities. If plaintiff's information was indeed converted, that is wrongful. For this reason, the Court enjoins defendants' from using plaintiff's fonts, typeface, and methods to produce their cards.

In response to the defendants' argument that the advertisements are not protected trade secrets, the Court finds the following: defendants are not prohibited from advertising their business, just prohibited from advertising their business in a style and manner all too similar to plaintiff. The Court is certain that defendants can develop their own marketing strategy.

Defendants now appeal the actions of the trial court in carrying out this Court's instructions on remand following supervisory review of the trial court's original preliminary injunction and its second preliminary injunction.

On appeal, defendants allege the following assignments of error: (1) that the trial court erred by misinterpreting the remand order; (2) the trial court erred in carrying out this Court's remand instructions; (3) the trial court erred on remand by not determining for itself if its original preliminary injunction was based on something other than the agent agreement; (4) the trial court erred on remand by failing to find that the original preliminary injunction was based entirely on the null and void agent agreement; (5) the trial court erred by enjoining defendants based entirely on an agent agreement that is null and void; (6) the trial court erred by applying the null and void agent agreement to the defendants that were not a party to the agent agreement; (7) the trial court erred by applying the wrong burden of proof in granting its preliminary injunctions; (8) the trial court erred by

providing injunctive relief for “trade secrets” that were not alleged to exist; (9) the trial court erred by assuming facts not in evidence in awarding its preliminary injunctions; (10) the trial court erred by granting injunctions to protect information that is not subject to trade secret protection; (11) the trial court erred by entering the second preliminary injunction without first dissolving all or part of the original preliminary injunction; (12) the trial court erred by applying the non-compete agreement to the defendants that were not a party to any non-compete agreement; (13) the trial court erred by entering the second preliminary injunction based upon a new non-compete agreement that was not properly in evidence; and (14) the trial court erred by entering the second preliminary injunction based upon an erroneous misperception that plaintiff’s information was subject to trade secret protection.

DISCUSSION

To obtain a preliminary injunction, the moving party must make a *prima facie* showing that she will prevail on the merits on the case. *General Motors Acceptance Corp. v. Daniels*, 377 So.2d 346 (La.1979). The proper standard of review is whether the trial court committed an error of law or made a factual finding which is manifestly erroneous or clearly wrong. *Gibson v. State*, 99-1730 (La. 4/11/00), 758 So.2d 782.

Although defendants argue that the trial court committed legal error when it conducted a hearing and considered evidence and argument that did not exist at the time of the original preliminary injunction, we find no merit in this argument. The original preliminary injunction issued by the trial court covered defendants’ competition with plaintiff business, defendants’ disclosure of plaintiff’s proprietary information, and defendants’ use of plaintiff’s customer lists. Thus, the original preliminary injunction was not based solely on the non-compete clauses in the

agent agreements. Further, we find nothing in this Court's order that prohibits the trial court from holding a hearing and accepting additional evidence. Because we do not find that the trial court committed legal error, we will review the trial court's factual findings under the manifest error standard of review.

Unfair methods of competition and unfair or deceptive acts in the conduct of any trade or commerce are unlawful in Louisiana. La. R.S. 51:1405. Injunctive relief is an available remedy for actual or threatened misappropriation of a trade secret. La. R.S. 51:1432.

La. R.S. 51:1431. Definitions.

(1) "Improper means" includes theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(2) "Misappropriation" means:

(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) used improper means to acquire knowledge of the trade secret; or

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(aa) derived from or through a person who had utilized improper means to acquire it;

(bb) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(cc) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) “Person” means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The affidavit of Fatima Ayala supports a finding that the information at issue was confidential and subject to protection by law. Fatima Ayala averred that she had been the manager of Card Center’s printing department since October 2006. She said that when she began to work for Card Center, the logos, fonts, formatting, and hologram lamination of Card Center’s identification cards were wholly different from those of its competitors. She said Card Center used “special” printers to make its cards. Ayala averred that Card Center kept the methods of how it prepared its cards confidential. Although she was taught the methods so she could perform her job, she had to sign a contract promising to keep the methods secret. Ayala attested that in late 2006, perhaps in November, Medina asked to see

the “special” printers that Card Center used to make its cards and to see the printers’ model numbers because she wanted to purchase a printer to use in Colombia. Believing that Medina had permission from Cristina Cali, Card Center’s president and sole stockholder, to get this information, Ayala permitted Medina to obtain the printer model numbers and watch the preparation of cards using Card Center’s “unique” methods. Within a week of that incident, Ayala found Medina copying electronic data from Card Center’s computer onto a CD. Medina asked for and obtained Ayala’s assistance, leading Ayala to believe that Cristina Cali had given Medina permission to obtain the files. Medina left the office with the CD containing Card Center’s forms. Ayala attested that Medina quit working for Card Center in December 2006, approximately one week after copying its electronic data onto the CD.

This evidence establishes (1) the information was confidential by nature and content, (2) efforts were made by Card Center to maintain and protect its confidentiality, (3) Ayala recognized the confidential nature of the information, (4) Medina appears to have tricked Ayala into disclosing this information, and (5) defendants used this information to Card Center’s detriment.

Given the unique circumstances of this case and the evidence presented, we find that Card Center has sufficiently established the requisite need for and entitlement to a preliminary injunction. For these reasons, we hereby affirm the judgment of the trial court.

AFFIRMED