STATE OF MICHIGAN

COURT OF APPEALS

MAGNETIC PRODUCTS, INC.,

Plaintiff-Appellant,

v

PURITAN MAGNETICS, INC., and ALLAN CRAWSHAW and JACK HAGEN, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
July 31, 1998

No. 198715
Oakland Circuit Court
LC No. 95-491765-CK

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

Plaintiff appeals from the trial court's judgment awarding it attorney fees but denying additional damages in this breach of fiduciary duty, misappropriation of trade secrets, unfair competition and civil conspiracy case. We affirm.

Plaintiff was founded in 1981 and is a small manufacturer of magnetic products. Plaintiff sells its equipment to various industries, where it is used to remove unwanted metal contaminants from products and to convey material. Plaintiff competes in a very competitive business and distinguishes itself by product design and customer service. Plaintiff employed Crawshaw and Hagen for approximately ten years, until they resigned in January 1995. Crawshaw was a sales engineer responsible for soliciting customers, visiting their facilities, and making recommendations for plaintiff's products. Hagen was a senior sales coordinator. At all pertinent times, plaintiff had a moonlighting policy that stated:

> Although outside employment is permitted, it should not interfere in any way with your job performance at MPI, nor should it constitute a conflict of interest. Anyone holding another job must notify MPI's Office Manager.

In August 1994, while employed by plaintiff, Hagen approached Crawshaw with the idea of starting a new business that would compete with plaintiff. Both Hagen and Crawshaw were aware of plaintiff's moonlighting policy. Defendant Puritan Magnetics, Inc., [Puritan] was incorporated on August 16, 1994, and Crawshaw, Hagen and Wyland, who provided advice and financing, began to plan for

the design of Puritan's products, assembly facilities, employee hiring needs, and marketing, including creating a brochure of the products they anticipated manufacturing and selling. Crawshaw and Hagen purchased stock in Puritan on November 10, 1994, and attended a shareholder meeting on that date. On January 23, 1995, defendants resigned from their employment with plaintiff. On that day or the day after, defendants mailed over 1,000 brochures to potential customers that contained photographs of plaintiff's products. Hagen and Crawshaw did not obtain plaintiff's permission to use the photographs of plaintiff's products.

In March 1995, the trial court granted plaintiff injunctive relief against defendants' unauthorized use of photographs of plaintiff's products in two Puritan sales brochures, and ordered that defendants recover the sales brochures from the recipients, destroy all such sales brochures, and return all copies of the photographs to plaintiff. The trial court also granted injunctive relief against defendants' use of plaintiff's customer lists, and ordered defendants to return plaintiff's customer lists.

Following a bench trial, the trial court entered judgment in plaintiff's favor on the unfair competition and civil conspiracy claims, and awarded plaintiff attorney fees of $5,771.00, the amount plaintiff incurred in obtaining injunctive relief.

The trial court determined that defendants breached their fiduciary duty to plaintiff, but did not award damages for the breach because it concluded that plaintiff failed to demonstrate by a preponderance of the evidence that any pecuniary loss was attributable to defendants' misconduct, as opposed to legitimate competition in the magnetics industry, and that plaintiff's "alleged damages are speculative". The trial court determined that plaintiff's claim of misappropriation of trade secrets failed for several reasons, including that customer names, in and of themselves, do not constitute a trade secret; and that plaintiff "failed to prove that defendants misappropriated its broadly and vaguely defined customer list." The trial court entered a judgment of no cause of action on plaintiff's breach of fiduciary duty and misappropriation of trade secrets claims. Plaintiff does not challenge the misappropriation of trade secrets judgment.

The trial court's opinion adopted a number of the parties' post-trial proposed findings of fact, some in toto, some in part:[1]

> [From plaintiff]
>
> [6(a)] In August of 1994, Jack Hagen, pursuant to an agreement or plan with Donald Wyland, contacted Defendant Allan Crawshaw about the prospects of working for a to-be-formed "magnet company" that was to compete with MPI.
>
> [7(a)] Puritan Magnetics, Inc. was incorporated on August 16, 1994.
>
> [8(a)] By September of 1994, Defendants Crawshaw and Hagen had begun working on behalf of Puritan Magnetics.
>
> [9(a)] Crawshaw, Hagen and Wyland all viewed the photographs used by Puritan in its product brochure, recognized that the photographs were MPI's

photographs of MPI's magnetic equipment and a conscious decision was made to use these photographs in Puritan's sales catalog to assist Puritan in marketing its products.

[10(a)] Hagen and Crawshaw purchased their stock in Puritan Magnetics on November 10, 1994 and attended their first shareholder meeting that same day.

[11(a)] Jack Hagen and Allan Crawshaw terminated their employment with MPI on January 23, 1995 and signed employment agreements with Puritan Magnetics on the same day.

[13(a)] Defendants Jack Hagen and Allan Crawshaw used MPI's photographs of MPI's products without MPI's consent or permission.

15(a) As a direct and proximate result of Defendants conduct, MPI sustained the following losses and/or damages:

- $5,77[1].00[2] to initiate lawsuit and seek appropriate injunctive relief regarding the Defendants' unauthorized use of MPI's photographs of its products.

[From defendants]:

[Under heading "Plaintiff's proofs fail to establish that customer list was misappropriated by Hagen and/or Crawshaw for use by Puritan.]

1. Crawshaw testified that their [Crawshaw, Hagen and Wyland]'s combined years of knowledge of magnetic customers, the assistance of trade journals, and the assistance of publications for manufacturer's representatives formed the basis of their initial customer list and the mailings to some 1,200 prospective magnetic users.

2. Pecuniary value, if any, realized by Puritan from Plaintiff's customer list <u>never</u> [sic was?] established, and Puritan's sales performance (as Puritan's 1995 financial year end statement shows) was at a substantial loss, which loss is still significant even when professional fees paid by Puritan are excluded from their 1995 year end operating expenses

[Under heading "Plaintiff's proofs fail to establish defendants engaged in unfair competition."]

2. Plaintiff's request for damages for unfair competition, excepting the attorney fees itemized in Defendants' exhibit A at $4,500.00,[3] are speculative and/or uncertain and as such cannot form the basis of recovery.

3. Plaintiff admitted that the "marketing expenses" of $32,000.00 could not be verified as attributable to the activities of Mr. Crawshaw and Mr. Hagen.

4. Witness Rhodes admitted that he was not able and it would be unrealistic for him to attempt to establish the particular dollar amount attributable to 1995 marketing expenses that were a direct result of anything that Mr. Hagen or Mr. Crawshaw did.

[Under the heading "Plaintiff's proofs fail to establish that it has been damaged by Hagen and Crawshaw being equity owners in a competitive company."]

3. Hagen's job performance for Plaintiff was above average.

4. The performance of employee Crawshaw up to the date of the termination of employment of William Peters on December 12, 1994, was above average.

5. Crawshaw not only met his goals established by Plaintiff's corporation but he looked for other things to find to go after.

8. Evidence from Plaintiff's witness Rhodes that Plaintiff's company was invited to bid and quote on sales to Morton Salt, American Crystal Sugar, McCain Citrus, and Atlas Technology, but was not awarded bid, fails to establish any casual [sic causal] nexus that award of sale to Puritan was unfair competition.

9. Testimony of expert witness Patrick Hanniford, CPA, called by Defendants [,] concerning reviewed financial statements for fiscal,[sic] 1994 and 1995 established that Plaintiff's financial performances in 1994 and 1995 were consistent.

11. Plaintiff's financials established that operating income and net income were the exact same percent of sales for the Plaintiff in fiscal 1994 and in fiscal 1995.

12. Plaintiff's witness Rhodes admits that the gross sales revenues of Plaintiff projects to $5 million for fiscal year ending September 30, 1996, a 65% increase over the Plaintiff's previous best year.

14. Puritan had no customers, no bids, no quotes and no magnetic products or equipment available for sale on January 23, 1995 or anytime prior to that date.

15. Plaintiff admits that it cannot provide any evidence that prior to Crawshaw's leaving Plaintiff's employment, that he ever sold magnetic products or equipment to a customer on behalf of anyone other than Plaintiff. [Emphasis in original.]

The trial court's opinion further stated:

> The Court finds Defendants, Hagen and Crawshaw, breached their fiduciary duty to Plaintiffs as alleged in Count I, however, Plaintiff failed to demonstrate by a preponderance of the evidence that any pecuniary loss was attributable to the Defendants' misconduct as opposed to legitimate competition in the magnetics industry.

> Plaintiff's alleged damages are speculative. As such, Plaintiff has failed to meet its burden of proof with respect to damages.
>
> * * *
>
> As to Count III, the Court finds Defendants engaged in unfair competition as it relates to their use of Plaintiff's photographs in Puritan's brochure. The Court awards Plaintiff $5,771.00 as compensation for the attorney fees incurred in obtaining injunctive relief. Plaintiff is not entitled to the incremental selling expenses it requested inasmuch as such requests were based upon speculation.
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> As to Count IV, the Court finds Defendants acted in concert to achieve an unlawful purpose, that being the unauthorized use of Plaintiff's photographs. As such, the Court finds for Plaintiff on Count IV; civil conspiracy. Fenestra v. Gulf American Land Corp., 377 Mich 565 (1966). Plaintiff's damages are limited to those awarded on the unfair competition claim.
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> Judgment shall enter as follows: No cause of action as to Counts I and II. Judgment for Plaintiff as to Counts III and IV, damages limited to $5,771.00 plus statutory interest.
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> IT IS SO ORDERED.

This appeal ensued.

I

Plaintiff first argues that the trial court erred as a matter of law when it applied the wrong measure of damages to plaintiff's successful breach of fiduciary duties claim. Plaintiff argues that the trial court should have awarded it the sum certain compensation it paid Crawshaw and Hagen during the time they were in undisputed breach of their fiduciary duties to plaintiff. Plaintiff argues that the compensation figures it paid Hagen and Crawshaw were not in dispute and that the trial court thus erred in concluding that damages were speculative.

We review the trial court's award of damages for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995). However, we review questions of law de novo. *Wilson v Taylor*, 457 Mich 232, 239; 577 NW2d 100 (1998).

Plaintiff relies on Restatement Agency, 2d, § 469, p. 399, which provides:

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is

not entitled to compensation even for properly performed services for which no compensation is apportioned.

Plaintiff argued below that:

> In this case, since both defendants acknowledged they were working for Puritan by August of 1994, but failed to inform MPI of their competitive involvement and/or resign their employment, they obtained these monies fraudulently. Thus, Plaintiff requests the return of . . . [$39,555.00] from Crawshaw and . . . [$22,034.00] from Hagen for a total of . . . $61,589.00.

Plaintiff further relied on § 469, Comment (a), which provides in pertinent part:

> An agent who, without the acquiescence of his principal, acts for his own benefit or for the benefit of another in antagonism to or in competition with the principal in a transaction is not entitled to compensation which otherwise would be due him because of the transaction.

Plaintiff argues that the "transaction" in this case is Crawshaw's and Hagen's employment by plaintiff, and that the result is the same even if the agent's conduct does not harm the principal, citing Comment (a), *supra*.

We agree with plaintiff that although no Michigan case has expressly adopted § 469, its themes run throughout Michigan's law of agency. "One who occupies a confidential and fiduciary relation to a person is held to the utmost fairness and honesty in dealing with that person." 1 Michigan Civil Jurisprudence, Agency, § 110, p 272-273, citing *Stephenson v Golden*, 279 Mich 493; 272 NW 881, mod on other grounds on reh 279 Mich 710; 276 NW 849 (1937), and *Goldman v Cohen*, 123 Mich App 224; 333 NW2d 228 (1983). The law will not permit an agent to place himself or herself in a situation in which the agent may be tempted by his or her own private interests to disregard those of the principal, and it is the agent's duty to disclose to the principal not only all material matters within the agent's knowledge, but also the agent's own interest in the transaction. *Greater Bloomfield v Braun*, 64 Mich App 128, 135, 136-137; 235 NW2d 168 (1975)[4] (citing *Hogle v Meyering* (syllabus), 161 Mich 472; 126 NW 1063 (1910);[5] *Sweeney & Moore, Inc, v Chapman*, 295 Mich 360, 363; 294 NW 711 (1940); *Moore v Meade*, 213 Mich 597, 606-607; 182 NW 29 (1921); see also *Kingsley Associates v Del-Met Inc*, 918 F2d 1277, 1283 (CA 6, 1990) (applying Michigan law). Thus, although § 469 has not been expressly adopted in Michigan, its principles have been applied in the above cited Michigan cases.

We also agree with plaintiff that the trial court found that defendants Hagen and Crawshaw breached their fiduciary duties to plaintiff. We agree as well that the amount of compensation plaintiff paid Hagen and Crawshaw from August 1994, when defendants incorporated Puritan, to January 23, 1995, when Hagen and Crawshaw's employment with plaintiff terminated, was not speculative.[6]

We conclude, however, that the trial court did not err in its determination that a return of compensation was not required in the instant case. The trial court found, and plaintiff does not challenge, that Puritan had no customers, no bids, no quotes and no magnetic products or equipment available for sale on January 23, 1995, the date Hagen and Crawshaw's employment with plaintiff

terminated, or anytime prior to that date. The trial court also found that plaintiff admitted it could not provide any evidence that, prior to Crawshaw's leaving plaintiff's employment, Crawshaw ever sold magnetic products or equipment to a customer on behalf of anyone other than plaintiff, and that Hagen's job performance for plaintiff was above average. Under these circumstances, the trial court was not obliged to order the return of compensation. See *Myers v Roger J Sullivan Co*, 166 Mich 193, 195-197; 131 NW 521 (1911); *Chem-Trend, Inc v McCarthy*, 780 F Supp 458, 460 (ED Mich 1991) (applying Michigan law). See also Restatement Agency, 2d, § 393, Comment (e), p 218.[7]

II

Plaintiff next argues that the trial court's finding that plaintiff admitted that additional marketing expenses of $32,000 could not be attributed to Crawshaw's and Hagen's activities is clearly erroneous. We disagree.

To recover damages for commercial losses, the plaintiff must establish with reasonable certainty the injury, a causal connection between the conduct complained of and the injury, and the appropriate compensation. *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 350; 480 NW2d 623 (1991).

Plaintiff argues that as a result of defendants' activities, it expended additional marketing expenses to retain its existing customers, rather than seek out new customers. Plaintiff was not able to identify what costs were associated with its normal marketing activities versus its marketing efforts to repair relationships with existing clients.[8] Thus, we find that the trial court did not err in concluding that plaintiff failed to establish a causal connection between defendants' conduct and the injury alleged, and that the damages for incremental sales expenses were speculative.

III

Finally, plaintiff argues that it was entitled to lost profits attributable to defendants' activities.

Calculation of lost profits cannot be based solely on conjecture and speculation. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 546; 362 NW2d 823 (1984). Plaintiff identified several customers whose business it lost to Puritan through bidding. However, the trial court concluded that plaintiff did not show by a preponderance of the evidence that its pecuniary loss was attributable to defendants' misconduct, as opposed to legitimate competition in the industry. This conclusion is adequately supported by the record. Moreover, the testimony in the record showed that plaintiff's gross profit percentages and operating income and net income percentages were basically comparable in 1994 and 1995. Finally, defendants recovered or asked recipients to destroy the brochures and sent an explanatory letter to all who received the brochures, and plaintiff was awarded attorney fees for legal expenses incurred in obtaining injunctive relief and compliance with the restraining order. Under these circumstances, we conclude that the trial court did not err in denying damages for lost profits.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Robert P. Young, Jr.

[1] We quote only the findings of fact adopted by the trial court that are pertinent to the issues before us. We have omitted the cites to the record contained in a number of the findings of fact, and have also omitted the portions of various findings of fact that the trial court did not adopt.

[2] The court noted that the correct figure was $5,771.00, not $5,777.00.

[3] This was a preliminary figure, and there is no dispute that the actual figure and the figure awarded was $5,771.00.

[4] In *Greater Bloomfield, supra* at 135-136, this Court noted:

> The general rule is that a broker may forfeit his right to compensation by misconduct, breach of duty, or wilful disregard, in a material respect, of an obligation imposed upon him by the law of agency. A corollary of this rule is that 'the law will not permit an agent to act in a dual capacity in which his interest conflicts with his duty without a full disclosure of the facts to his principal.' *Hogle v Meyering* (syllabus), 161 Mich 472 [quoting *Sweeney v Moore, Inc, v Chapman*, 295 Mich 360, 363; 294 NW 711 (1940)].
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> * * *
>
> . . . . For an agent to be denied his compensation, it is enough to show that his actions presented the temptation to sacrifice his principal's interests. It is not necessary to show actual injury to the principal. 1 Mecham on Agency (2d ed), § 1589.

[5] The Supreme Court in *Hogle, supra*, which also involved an agent in a real estate transaction, noted in pertinent part:

> The law will not permit a man to act in a dual capacity, and the two positions of principal and agent are inconsistent with each other. *Humphrey v. Transportation Co.*, 107 Mich 163 (65 N.W. 13). In this case it was held that an agent for the sale of property loses his right to commission from his principal where he does not disclose the fact that a corporation in which he is interested as a stockholder and director is the real purchaser, and that the nominal purchaser, who has a valuable contract with the seller dependent upon the making of the sale, is furnishing a large bonus towards the purchase. See authorities cited. This reasoning applies with still greater force where the parties pretending to act as agents are themselves interested as a principal in the

> transaction. 1 Am. & Eng. Enc. Law (2d Ed.), p. 1072, and note. An agent will not be allowed to place himself in a position in which his duty and interest conflict, or be permitted to make a secret profit out of the agency. In this State the principle is applied to public officers, administrators, agents, etc. As this principle is elementary, we refrain from citing further authorities.

[6] We observe that it is not clear that the trial court's reference to speculative damages was intended to refer the amount of the individual defendants' compensation.

[7] Restatement Agency, 2d, § 393, Comment (e), p 218, states in pertinent part:

> . . . . Even before the termination of the agency, [an agent] is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. He is not, however, entitled to solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business.

[8] We further observe that plaintiff's damage figure was for the 1995 fiscal year that ended on September 30, 1995, and thus included the four months before Crawshaw and Hagen left plaintiff's employ, i.e., the four months before defendants sent out their brochures using plaintiff's photographs.