STATE OF MICHIGAN

COURT OF APPEALS

RAYCON CORPORATION, INC.,

Plaintiff-Appellant,

v

CERAMTECH, INC., DENNIS WALKER and STEVE KENDALL,

Defendants-Appellees.

UNPUBLISHED
March 28, 2000

No. 209332
Washtenaw Circuit Court
LC No. 96-007289 CZ

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff Raycon Corporation appeals as of right from a partial judgment in its favor. In this case, plaintiff accused defendants of misappropriating its trade secrets and confidential information and utilizing this information in direct competition with plaintiff. Plaintiff alleged several counts against each defendant, but the jury found only defendant Dennis Walker liable for breach of contract, awarding plaintiff $5000 in damages. We affirm.

Plaintiff is an Ann Arbor corporation that manufactures electric discharge machines (EDMs). Plaintiff also manufactures replacement ceramic wire guides, which represent small but necessary components of the EDMs. These ceramic wire guides are at the center of the instant case. Plaintiff filed its complaint against two of its former employees, Walker and Steve Kendall, and Ceramtech, Incorporated, a company founded by Walker and Kendall that competes with plaintiff in the production and sale of ceramic wire guides. Plaintiff alleged that when it employed Walker and Kendall, it required that each sign employment and confidentiality agreements. Plaintiff further asserted that it had invested millions of dollars in researching and developing its ceramic wire guide manufacturing techniques, and that by doing so it had obtained a significant competitive advantage in producing and selling the guides. According to plaintiff, Walker and Kendall during their employment with plaintiff achieved intimate familiarity with proprietary and confidential information concerning the development and manufacture of single electrode ceramic wire guides, and misappropriated this information to compete against plaintiff in the production and sale of these guides.

Plaintiff alleged that Walker and Kendall breached their employment agreements (count one), misappropriated trade secrets in violation of the fiduciary duties they owed plaintiff as its employees (count two), and that defendants interfered with plaintiff's economic relationships and future economic advantage (count three). The jury unanimously returned a special verdict rejecting counts two and three, and finding only Walker liable for breach of contract. Plaintiff sought postjudgment relief, including judgment notwithstanding the verdicts (JNOV) and/or a new trial, which the trial court denied.

I

Plaintiff first contends that the trial court erred in denying its motion for JNOV regarding its breach of fiduciary duty claims. In reviewing the denial of a motion for JNOV, this Court views the evidence and all legitimate inferences that may be drawn from the evidence in a light most favorable to the nonmoving party. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence so viewed fails to establish a claim as a matter of law should a motion for JNOV be granted. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Central Cartage*, *supra*. Whether the evidence presented failed to establish a claim as a matter of law is a question that we review de novo. *Forge*, *supra*.

A

Plaintiff claims that it is entitled to JNOV regarding its breach of fiduciary duty claims because overwhelming evidence showed that Walker solicited plaintiff's customers while he still worked for plaintiff. Plaintiff points to the fact that Walker contacted potential customers on more than one occasion while he continued to work for plaintiff. Plaintiff also mentions that one of its customers, Caterpillar, Inc., sent Walker sample guides and blocks while Walker worked for plaintiff, and argues that Walker's August 22/23, 1995 letter reflects that Walker "had already solicited and received business from Caterpillar, and was days away from completing the work."

The jury rejected the special verdict question whether Walker "occupied an agency or fiduciary relationship to Raycon and breached his duties to Raycon pursuant to that relationship." It is unclear from this finding whether the jury found no special relationship between Walker and plaintiff, or whether the jury found that, assuming the existence of a special relationship, Walker did not breach his fiduciary or agency duties. Even assuming the existence of a fiduciary duty or agency relationship, we find that sufficient evidence supported the jury's reasonable conclusion that Walker did not breach this duty.

While Walker admitted contacting potential customers as he continued to work for plaintiff, other facts existed from which the jury reasonably could have concluded that Walker merely prepared his post Raycon employment venture. The trial court properly instructed the jury that "[a]n employee is not entitled to solicit customers for a rival business before the end of his employment. What constitutes a permissible notification to customers of a new business venture and impermissible solicitation is dependent on facts and circumstances surrounding the communication between the employee and the prospective customer." See Restatement 2d Agency, § 393, comment e, p 218 ("Even before the termination of the agency, [the agent] is entitled to make arrangements to compete . . . . Thus, before

the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete;" the agent may not, however, "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.").

In this case, we initially note that no evidence showed that Walker had ever signed a noncompetition agreement. Walker explained that during his July 1995 phone calls to potential wire guide customers he sought to ascertain whether another wire guide supplier could viably compete in the marketplace, and whether ceramic wire guide purchasers would consider a supplier other than plaintiff. Walker's August 4 and August 14, 1995 letters to Delphi Automotive and Caterpillar merely reflect his efforts to follow up with these wire guide buyers somewhat more specifically concerning pieces that Ceramtech might be able to provide them, by inviting blueprints from which Walker could prepare a quotation. Walker apparently did not prepare a specific quote for any potential customers until he prepared one for Caterpillar on August 23, 1995, the day he resigned his employment with plaintiff. Uncontradicted evidence revealed that Ceramtech's earliest firm purchase order was received on September 12, 1995, that Walker had not even begun purchasing used grinders and mills for Ceramtech until after he resigned his job with plaintiff, and that Ceramtech did not receive its first payment for parts delivered until mid November 1995. Under these circumstances, the jury did not err as a matter of law in finding that Walker's actions constituted permissible customer notification that did not violate any fiduciary duty he might have owed plaintiff. See *Myers v Roger J Sullivan Co*, 166 Mich 193, 196-197; 131 NW 521 (1911) (The Supreme Court held that "the mere planning by an employ[ee] during his contract of employment to engage after the expiration thereof in a competing business does not justify his discharge as a matter of law," noting that the plaintiff had "not as yet entered into business, and did not propose to until the expiration of [his] term of hiring," and distinguishing the situation in which an employee has already established "an active interest in a competing business."); Restatement 2d Agency, *supra*.

B

Plaintiff next asserts that the jury's finding that Walker breached a contract with plaintiff necessitates the conclusion that Walker likewise breached his fiduciary duties to plaintiff. Plaintiff explains that the only contracts involved at trial were confidentiality agreements, and that Walker's breach of a confidentiality agreement by stealing or utilizing confidential information obtained in the course of his employment constitutes a breach of his fiduciary duty to plaintiff.

In finding that Walker breached a contract with plaintiff, the jury did not more specifically explain what agreement Walker breached. Plaintiff seizes on the ambiguous nature of the jury's finding in this respect to argue that the jury must have found Walker liable for breaching a confidentiality agreement. Plaintiff makes this argument despite the jury's separate finding that Walker was not "liable to Raycon for misappropriation of trade secrets or confidential information." Thus, plaintiff's reasoning essentially requires that this Court subvert at least two specific jury findings, i.e., that Walker took no confidential information and that Walker did not breach a fiduciary duty. Plaintiff's reasoning must fail, however, for two reasons.

First, the jury's specific finding that Walker did not take plaintiff's confidential information was supported by evidence presented at trial. Uncontradicted testimony showed that none of plaintiff's employees specifically informed Walker or Kendall of any information or items plaintiff considered proprietary or trade secrets. Absolutely no evidence beyond the suspicions of Jay Saarinen, plaintiff's operations manager, established that Walker or Kendall ever took drawings or confidential customer lists from plaintiff. Walker and Kendall denied doing so. Regarding drawings, evidence suggested that some of plaintiff's large customers had obtained on a nonconfidential basis plaintiff's drawings of replacement parts, including ceramic wire guides.

In response to plaintiff's suggestions that defendants took from plaintiff confidential fixtures and techniques employed in making ceramic wire guides, several witnesses testified to the contrary that the ceramic wire guide production process involved common tools and techniques. These witnesses' testimony established that AstroMet, Inc. successfully reverse engineered the ceramic wire guides, utilizing no drawings and common measuring and grinding devices. The testimony of Robert G. Bredemeyer, owner of Micro EDM, Caterpillar employees and a General Motors employee established that to some extent they all manufactured their own ceramic wire guides. Furthermore, engineer Robert Byrum, who viewed both plaintiff's and Ceramtech's manufacturing processes, indicated that while some phases of the manufacturing processes were similar or involved similar tools, these processes and tools were common and/or readily known in the machining industry.

To the extent that plaintiff suggested that Delphi and Caterpillar business cards represented confidential information Walker obtained in the course of his employment, Walker testified that he received the Caterpillar employee's card in a social setting. Walker recalled that during his employment with plaintiff he received or exchanged business cards on several occasions, indicated that he did not consider the receipt of a business card to represent the acquisition of confidential information, and denied that plaintiff ever told him that he must turn over all business cards he received. The Supreme Court has previously concluded that where a former employee had significant customer contact while employed with a company and kept the names and addresses of company customers in a personal memo book, but did not actually steal a confidential customer list, "[i]n general there is nothing improper in an employee establishing his own business and communicating with customers for whom he had formerly done work in his previous employment." *Hayes-Albion Corp v Kuberski,* 421 Mich 170, 183; 364 NW2d 609 (1984).

While plaintiff also indicated that Walker must have misappropriated plaintiff's pricing information, it produced no evidence establishing that Walker had uncovered this information, and Walker denied that he had. Plaintiff further suggested that the fact that it had a problem with slow delivery and the identities of its raw materials suppliers also constituted confidential information that Walker stole. Walker stated that he had heard from many of plaintiff's customers that they were upset with plaintiff's slow delivery times, and that he conveyed this information to plaintiff. Several of

plaintiff's customers indicated that they had problems with plaintiff's tardy deliveries, and Saarinen indicated that this fact was common knowledge throughout plaintiff's plant. Regardless of the extent of knowledge regarding plaintiff's slow delivery, the evidence did not tend to establish that Walker had acquired information concerning the peculiar needs of particular clients, but merely the unremarkable proposition that plaintiff's customers did not appreciate plaintiff's slow response times. *Hayes-Albion Corp*, *supra* at 183-184. Regarding the identities of plaintiff's raw materials suppliers, the Supreme Court found no problem with a former employee purchasing materials from the same suppliers as the company for which he formerly had worked. *Id*. at 184-185.

In light of this evidentiary background, we conclude that the jury's finding that defendants did not misappropriate any trade secrets or confidential information was reasonable. *Forge*, *supra*; *Central Cartage*, *supra*.

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Secondly, plaintiff bases his construction of the jury's verdict on the flawed premise that the jury had to have found that Walker's breach of contract constituted his taking of confidential information because only confidentiality agreements were presented to the jury. Plaintiff's argument that it never sought damages based on Walker's violation of agreements other than the confidentiality agreements ignores its own evidence, which contained agreements and terms beyond confidentiality agreements. Plaintiff produced records signed by Walker showing that between July 24, 1995 and his August 23, 1995 resignation Walker had taken three half-day absences (two sick, one vacation) for which he was paid. Other documents signed by Walker that plaintiff presented showed that Walker had not worked between August 10 and August 21, 1995, and that he had received disability benefits, claiming a knee injury. Plaintiff suggested at trial that defendant was not in fact sick or disabled, but simply took days off and got paid for them by plaintiff while soliciting plaintiff's customers for the Ceramtech venture. Plaintiff also alleged at trial that Walker received business cards during the course of his employment with plaintiff and that he improperly took these cards with him when he resigned. Plaintiff suggested that this conduct by Walker violated paragraph two of the June 24, 1988 "Raycon Corporation Employee Agreement" he had signed.

The possibility exists that on the basis of this evidence the jury believed that Walker lied regarding his sickness and his disability, thus breaching his employment contract with plaintiff, and that Walker should not have received pay from plaintiff while making contacts for his future competing business. It is also conceivable that the jury might have found, without concluding that any business card Walker received during the course of his employment constituted confidential information, that Walker breached paragraph two of his employment agreement, and that some damages should be assessed for this conduct.

Accordingly, we reject plaintiff's contention that the jury's finding that Walker breached a contract with plaintiff necessitates the conclusion that Walker likewise breached his fiduciary duties to plaintiff. We conclude that the jury reasonably determined that Walker took no confidential information, and that this finding precludes plaintiff's argument that Walker's breach of contract constituted his taking of plaintiff's confidential information. An acceptance of plaintiff's interpretation of the jury's finding that

Walker breached a contract would at least require rejection of the jury's finding that Walker did not take plaintiff's confidential information, which would in turn require rejection of the jury's finding that Walker did not breach a fiduciary duty to plaintiff, which then might likely require rejection of the jury's conclusions that Kendall and Ceramtech were liable for no damages. Accepting plaintiff's argument thus would contravene the Supreme Court's instruction that "it is fundamental that every attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998), quoting *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987).

II

Plaintiff next asserts that because the jury found that Walker breached his confidentiality agreements with plaintiff, the trial court improperly denied plaintiff's request for a constructive trust on Ceramtech's profits from sales of ceramic wire guides. Plaintiff further argues that defendants Kendall and Ceramtech must suffer some liability for Walker's taking of plaintiff's confidential information because Walker's actions clearly furthered Kendall's and Ceramtech's interests. Because the jury expressly determined that Walker did not take plaintiff's confidential information, however, and because we have concluded that significant evidence supported this conclusion, we reject as without foundation these arguments of plaintiff.

III

Lastly, we reject defendants' suggestion that we sanction plaintiff for a vexatious appeal pursuant to MCR 7.216(C). To the extent that many of plaintiff's arguments misinterpret the jury's verdicts, we agree that the arguments lack merit. Plaintiff's argument that Walker breached a fiduciary duty by improperly soliciting plaintiff's customers, however, was not completely meritless. Although plaintiff faced a difficult standard to overcome to obtain JNOV, the evidence at trial could have conceivably supported a conclusion by the jury that Walker improperly solicited plaintiff's customers. Sanctioning plaintiff for a vexatious appeal in this case would effectively punish plaintiff for exercising its right to appeal, which we decline to do.

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey