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NO. COA09-1160

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

ARMACELL LLC,
Plaintiff-Appellee,

v.

Alamance County
No. 08 CVS 224

JEFFREY BOSTIC, L'ISOLANTE
K-FLEX S.r.l., and K-FLEX
USA L.L.C.,
Defendants-Appellants.

Appeal by Defendants from orders entered 20 May 2009 by Judge Ben F. Tennille in the North Carolina Business Court. Heard in the Court of Appeals 10 February 2010.

Womble Carlyle Sandridge & Rice, PLLC, by M. Todd Sullivan, for Plaintiff-Appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Robert J. Morris, for Defendants-Appellants.

McGEE, Judge.

Armacell LLC (Plaintiff) filed a complaint on 24 January 2008, seeking a temporary restraining order, preliminary injunction, permanent injunction, and other relief. Plaintiff sought to prevent Jeffrey Bostic (Bostic), a former employee, from disclosing certain trade secrets to L'Isolante K-Flex S.r.l. (L'Isolante) and K-Flex USA L.L.C. (K-Flex) (collectively, Defendants). Plaintiff amended its complaint on 10 April 2008, naming L'Isolante and K-Flex as additional defendants and asserting six claims for relief.

Among Plaintiff's claims was a cause of action alleging misappropriation of trade secrets under N.C. Gen. Stat. § 66-152 *et seq.* Plaintiff asserted that Bostic, while employed by Plaintiff, had acquired certain "Trade Secret Information" and had subsequently passed that information on to L'Isolante and K-Flex. Plaintiff sought, *inter alia*, a preliminary injunction to protect the trade secret information.

L'Isolante moved to dismiss Plaintiff's claims against it for lack of personal jurisdiction on 22 May 2008. Pursuant to N.C. Gen. Stat. § 7A-45.4(b), Chief Justice Parker designated this case as "mandatory complex business" in an order filed 29 May 2008; the case was thereby assigned to the Business Court for disposition. The trial court entered orders on 20 May 2009 denying L'Isolante's motion to dismiss for lack of personal jurisdiction and granting Plaintiff's motion for preliminary injunction against K-Flex and L'Isolante. Defendants L'Isolante and K-Flex appeal. We note that, in its order denying L'Isolante's motion to dismiss, the trial court found that Bostic was "unwilling to speak to the matter [and] pleaded the Fifth Amendment to the U.S. Constitution and . . . refused to discuss the issue since he is allegedly under federal criminal investigation." The trial court's order granting preliminary injunction contains a similar finding. Bostic is not a party to this appeal.

I. Factual Background

The evidence before the trial court tended to show that Plaintiff is a North Carolina corporation headquartered in Mebane,

North Carolina, that develops and sells insulation products. Bostic was employed by Plaintiff for approximately fifteen years. Bostic was a "Senior Research Scientist in [Plaintiff's] Research and Development ("R&D") group until . . . January 2008." L'Isolante is an Italian corporation that produces and sells foam insulation products. K-Flex is a North Carolina limited liability company, a single-member LLC, and has been solely owned by L'Isolante since 9 January 2008. Prior to 9 January 2008, K-Flex was jointly owned by L'Isolante and Nomaco, Inc., and was known as Nomaco K-Flex (NKF). K-Flex was also in the insulation business and was Plaintiff's direct competitor. K-Flex and L'Isolante were engaged in a business relationship whereby, *inter alia*, K-Flex produced and sold L'Isolante's products and L'Isolante performed research and development (R&D) functions for products made by K-Flex.

In May 2007, NKF received Bostic's resume and a copy of his employment agreement with Plaintiff. A recruiter suggested Bostic as a candidate for an engineering position at NKF. Because Bostic's employment agreement contained non-compete and confidentiality provisions, NKF decided not to pursue Bostic as an employee at that time. However, after NKF's plant chemist resigned in July 2007, Bostic was considered as a replacement.

NKF consulted a North Carolina law firm to review Bostic's employment contract and determine whether either the non-compete restrictions or the confidentiality restrictions would prohibit Bostic from working as plant chemist at NKF. The law firm was the

same firm that was assisting L'Isolante in its purchase of Nomaco, Inc.'s interest in NKF. The law firm advised NKF that, while the non-compete clause would likely not be enforceable against K-Flex, Bostic would remain bound by his confidentiality agreement.

Bostic met with Guiseppe Guarino (Guarino), NKF's chief executive officer, in September 2007. Guarino discussed employment possibilities with Bostic and informed Bostic that should he be hired by NKF, he would probably be invited to Italy to meet with the L'Isolante team. NKF employees were often sent to Italy to meet with L'Isolante personnel. Bostic later met in Raleigh with Carlo Spinelli, who served as both L'Isolante's chief executive officer and a manager of NKF. Bostic also met with Flavio Signorelli, an employee of L'Isolante.

Guarino emailed Bostic an outline of the salary and benefits package that NKF was "ready to . . . offer[.]" The package included a possible bonus of up to twenty per cent of Bostic's salary for "achievement strictly related to [his] area of expertise and objective[s] that will be set at the beginning of the year." Guarino also stated that "[t]he objectives will revolve around development on new formulation for current rubber product, EPDM, etc." Bostic accepted employment with NKF in December 2007, with his start date scheduled for 7 January 2008, two days before L'Isolante completed its acquisition of NKF.

Plaintiff filed its original complaint in this action on 24 January 2008, alleging that Bostic had undertaken "a surreptitious campaign of disloyal actions" after he learned of NKF's intended

benefits package. The complaint alleged that Bostic had copied onto external, portable hard drives and notebooks, by way of encrypted software he placed on his computers at work, Plaintiff's competitively sensitive and confidential information. Bostic initially denied these allegations, but he later admitted to having taken some data. Plaintiff asserted that a hard drive taken by Bostic contained more than 7,000 files that Bostic had downloaded from Plaintiff's network on 31 December 2007. Plaintiff also asserted that Bostic had downloaded over 2,000 files to compact discs. Plaintiff asserted the hard drive was eventually returned to Plaintiff, but that L'Isolante and K-Flex claimed to have never seen either the hard drive or the compact discs.

Bostic went to Guarino's office on 5 February 2008 and admitted he had taken the data from Plaintiff. Bostic apologized and asked Guarino if K-Flex would still employ him. Guarino told Bostic to leave and K-Flex later terminated his employment. Further facts will be discussed as necessary.

II. Interlocutory Appeal

The orders before our Court do not dispose of all matters in the case and leave some issues pending before the trial court; therefore the appeal is interlocutory. *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 304, 655 S.E.2d 446, 448 (2008). We first address L'Isolante's appeal from the trial court's denial of its motion to dismiss based on personal jurisdiction. N.C. Gen. Stat. § 1-277(b) provides that "[a]ny interested party shall have the right of immediate appeal from an

adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C. Gen. Stat. § 1-277(b) (2009); *Eaker v. Gower*, 189 N.C. App. 770, 659 S.E.2d 29 (2008). L'Isolante is appealing from an adverse ruling as to personal jurisdiction; therefore, this portion of the appeal is properly before us.

Both Defendants also appeal from the trial court's order granting Plaintiff's motion for a preliminary injunction. An appeal from an order granting preliminary injunction is interlocutory. *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002). "An appeal may be proper, however, in cases, including those involving trade secrets and non-compete agreements, where the denial of the injunction 'deprives the appellant of a substantial right which he would lose absent review prior to final determination.'" *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004). Defendants argue that the injunction granted in this case affects their substantial rights. We therefore review Defendants' appeal from the trial court's order granting a preliminary injunction and deny Defendants' petition for certiorari because Defendants have demonstrated that their substantial rights are affected.

III. L'Isolante and Personal Jurisdiction

L'Isolante first argues that the trial court erred by denying its motion to dismiss for lack of personal jurisdiction. We review a trial court's denial of a motion to dismiss for lack of personal

jurisdiction to determine whether the trial court's findings of fact are supported by competent evidence, and whether those findings support the trial court's conclusions of law. *State ex rel. Cooper*, 188 N.C. App. at 304, 655 S.E.2d at 448. Any findings of fact not challenged by the appellant are deemed binding on appeal. *Id.* We review the trial court's conclusions of law *de novo* to determine whether "North Carolina statutes permit our courts 'to entertain this action against defendant[s], and, if so, whether this exercise of jurisdiction violates due process.'" *Saxon v. Smith*, 125 N.C. App. 163, 168, 479 S.E.2d 788, 791 (1997) (citations omitted).

A. Findings of Fact

L'Isolante challenges two of the trial court's findings of fact: (1) that "[s]hortly after Bostic went to work at K-Flex, he was communicating with L'Isolante's R&D chief, Andrea Marenghi in Italy[;]" and, (2) that "L'Isolante describes North Carolina-based K-Flex as one of L'Isolante's 'branches' or 'production plants' in L'Isolante's global operation[.]" Even assuming, *arguendo*, that these findings are in error, we hold that the trial court's remaining unchallenged findings of fact support its conclusions of law.

B. Standard of Review

When evaluating personal jurisdiction, the trial court must engage in a two-step inquiry: first, the trial court must determine whether a basis for jurisdiction exists under the North Carolina "long-arm statute," N.C. Gen. Stat. § 1-75.4 (2007), and second, if so, the trial court must determine whether the assertion of personal jurisdiction over the

defendant is consistent with applicable due process standards. . . . "When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry[,]" which is whether defendant has the "minimum contacts necessary to meet the requirements of due process." . . . Specifically, this Court has held that, "when evaluating the existence of personal jurisdiction pursuant to G.S. § 1-75.4(1)(d)," "the question of statutory authorization 'collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.'"

Brown v. Meter, ___ N.C. App. ___, ___, 681 S.E.2d 382, 387 (2009) (citations omitted).

C. North Carolina's Long-Arm Statute

L'Isolante next challenges the trial court's conclusions that provisions of N.C. Gen. Stat. § 1-75.4 permit the exercise of personal jurisdiction over Defendants in this case. The trial court's order denying L'Isolante's motion to dismiss for lack of personal jurisdiction contains the following unchallenged findings of fact:

- (6) In 2001, for the purpose of doing business in North America, L'Isolante entered into a joint venture in North Carolina with Nomaco, a North Carolina-based manufacturer located in Youngsville, North Carolina. . . . Their venture was called Nomaco K-Flex LLC ("NK"), a North Carolina LLC. . . . The president was Nomaco's Scott Edwards. . . .
- (7) By the end of 2006, L'Isolante had started the process of buying out Nomaco's interest in NK, with the objective of converting NK into a single-member LLC owned by L'Isolante. . . . The buyout ultimately closed on January

9, 2008, at which point NK became a single-member LLC owned by L'Isolante and changed its name to K-Flex. . . .

- (8) . . . K-Flex serves as a production facility for L'Isolante's products. . . . Products sold by K-Flex out of North Carolina are L'Isolante's products that L'Isolante developed. . . . Employees in North Carolina were required to enter into confidentiality agreements with L'Isolante to protect L'Isolante's interests in its proprietary information that L'Isolante furnished to the North Carolina company. . . . L'Isolante has shipped equipment and product components to the North Carolina plant so that insulation could be manufactured in this State by NK, which became K-Flex. . . .
- (9) K-Flex employees are trained by L'Isolante, and when they have chemical-related questions or need guidance on production processes, they contact L'Isolante. . . . L'Isolante's technical and R&D personnel, including R&D chief Marenghi, visit the North Carolina plant to work with K-Flex employees. . . .
- (10) K-Flex has no R&D department and neither did predecessor NK; the R&D function of developing new production formulations has been done by L'Isolante's R&D team in Italy, which develops new products for the benefit of L'Isolante's multinational operations. . . . L'Isolante provided the benefits of its R&D function to the joint venture with Nomaco and then to K-Flex in North Carolina. . . .
- (11) For purposes of the transaction in which L'Isolante would buyout Nomaco's interest in NK and transition from a joint venture to a company solely-owned by L'Isolante, by 2007 L'Isolante had selected Guiseppe Guarino to be L'Isolante's agent. . . . L'Isolante knew at that time that Guarino would become president of the single-member LLC that would emerge after L'Isolante's acquisition of Nomaco's interest. . . . According to Guarino's testimony, in the latter half of 2007

Guarino was operating under an "appoint[ment]" by Spinelli to "work . . . on the L'Isolante side" as L'Isolante's "representative," and Guarino took his instructions from Spinelli. . . .

- (12) During that time period, Spinelli instructed Guarino to pursue Bostic, the Senior Research Scientist in [Plaintiff's] R&D group, for employment, with the objective of having Bostic employed by the North Carolina-based LLC upon L'Isolante's buyout of Nomaco's interest in NK. . . . Bostic, a long-time [Plaintiff] employee, had knowledge of [Plaintiff's] manufacturing processes and was one of the persons most knowledgeable about [Plaintiff's] non-public and competitively sensitive processes. . . . Guarino testified that he shared Bostic's résumé "with the people in Italy, and they said . . . we should pursue this guy." . . .
- (13) Bostic had an employment agreement with Plaintiff containing a limited covenant not to compete and a nondisclosure covenant protecting [Plaintiff]. . . .
- (14) After Guarino had his first meeting with Bostic in September 2007 at a restaurant in Durham, North Carolina, and after phone conversations between them, a meeting was arranged for the Angus Barn restaurant in Raleigh, North Carolina in late September or early October 2007. . . . In addition to Guarino and Bostic, that meeting was attended by two (2) L'Isolante officials: Spinelli and Flavio Signorelli. . . . Signorelli, based in Italy, is L'Isolante's manufacturing expert in charge of production processes and formulas. . . . Signorelli's focus is optimizing L'Isolante's processes. . . .
- (15) At the conclusion of the Angus Barn meeting, Spinelli told Guarino to work out an employment agreement with Bostic. . . . About a week later, on October 8, 2007, Guarino, using his home computer, sent an email to Bostic's

personal email address. The email memorialized their offer of a six-figure salary and benefits plus a bonus of up to 20% of his base salary. . . . The email stated that Bostic's bonus would not be tied to the company's earnings but instead "to achievement strictly related to your area of expertise and objective," and that the "objectives will revolve around *development on new formulation for current rubber product, EPDM, etc.*". . .

- (16) Thus, Guarino and Spinelli offered Bostic and incentive-based bonus for developing new formulations, including new formulations for EPDM. EPDM is ethylene propylene diene methylene. . . . EPDM is a polymer that [Plaintiff] and its affiliates had used to develop proprietary insulation products. . . . L'Isolante was not then distributing EPDM products. . . .
- (17) Bostic agreed in October 2007 to accept employment for a six-figure salary plus deferred compensation. . . . Guarino told Bostic that his employment would not formally begin until January 2008; that would be when L'Isolante's acquisition of Nomaco's interest in NK would close, transforming the LLC into a single-member LLC owned exclusively by L'Isolante. . . .
- (18) In the weeks leading up to his resignation from [Plaintiff], as his start date with K-Flex approached, Bostic proceeded to misappropriate thousands of data files containing sensitive proprietary information and trade secrets, using a CD burning application and an external hard drive. . . . The files included sensitive data files from [Plaintiff's] R&D library, including the formulas and processing protocols for [Plaintiff's] EPDM products. . . .

. . .

- (20) Bostic left for Italy on January 26, 2009, for a two (2)-week visit with L'Isolante officials. . . . He spent

approximately five (5) days at L'Isolante's headquarters where he had meetings with Spinelli and Signorelli, and where he met alone with Andrea Marengi, L'Isolante's chief R&D chemist. . . .

Based on these findings, the trial court made the following conclusion of law:

- (23) The [c]ourt has long-arm jurisdiction over L'Isolante pursuant to N.C.G.S. § 1-75.4(1)(d). This section allows personal jurisdiction over a non-resident defendant if, at the time of service of process, the defendant "is engaged in substantial activity within this State." N.C.G.S. § 1-75.4(1)(d). L'Isolante was engaged in substantial activity in North Carolina through the materials, products, and services it provided to K-Flex in North Carolina, including specifically through assistance that L'Isolante's R&D unit provided.

L'Isolante contends that this conclusion of law is error because "[t]he trial court's findings regarding the relationship between L'Isolante and K-Flex merely show contacts ordinarily incident to a parent-subsidiary relationship[.]" Defendants rely on *Setra of North Am., Inc. v. Motorcoach Fin. Inc.*, in arguing that "the mere presence of a subsidiary in North Carolina, standing alone, is not sufficient to impute personal jurisdiction over the parent corporation." *Setra of North America v. Motorcoach Financial*, 367 F.Supp.2d 853, 859 (M.D.N.C. 2005); see also *Ash v. Burnham Corp.*, 80 N.C. App. 459, 462, 343 S.E.2d 2, 4 (1986).

In *Setra*, the court addressed whether it could exercise personal jurisdiction over EvoBus, a German corporation, based on its relationship with Setra, a Maine corporation with its principal

place of business in North Carolina. The court found the following pertinent facts:

EvoBus is a German limited liability company headquartered in Stuttgart. . . . Although it manufactures "Setra" brand motorcoaches, EvoBus does not import, distribute or advertise the motorcoaches or component parts in North America. . . . Rather, Setra takes title to the motorcoaches at EvoBus' factory in Ulm, Germany, and arranges shipment of the motorcoaches to the United States. . . . Setra then sells and services the motorcoaches in North America. . . . EvoBus and Setra have formally maintained their separate corporate identities, and keep their business records and tax returns separate. . . .

According to the undisputed evidence of record, EvoBus has never been a resident of North Carolina, nor has it ever been licensed, registered or authorized to do business in North Carolina. Further, EvoBus has never owned or leased any property in North Carolina or paid taxes in North Carolina. . . .

However, there is evidence of regular business contacts and interaction between EvoBus and Setra. EvoBus employees have visited Setra's offices in Greensboro, North Carolina on approximately 13 occasions[.]

Setra, 367 F.Supp.2d at 856.

In the case before us, we find that the connections between L'Isolante and K-Flex are significantly greater than those in *Setra*. Importantly, L'Isolante and K-Flex do not operate on the same import basis as in *Setra*. *Setra* took title to EvoBus's products in Germany and then "arrange[d] shipment of the [products] to the United States." *Id.* In contrast, in the case before us, the trial court found the following relationship between L'Isolante and K-Flex:

K-Flex serves as a production facility for

L'Isolante's products. . . . Products sold by K-Flex out of North Carolina are L'Isolante's products that L'Isolante developed. . . . Employees in North Carolina were required to enter into confidentiality agreements with L'Isolante to protect L'Isolante's interests in its proprietary information that L'Isolante furnished to the North Carolina company. . . . L'Isolante has shipped equipment and product components to the North Carolina plant so that insulation could be manufactured in this State by [NKF], which became K-Flex.

We find that the relationship between L'Isolante and K-Flex has greater "substantial activity" than the simple parent-subsidary relationship implicated in *Setra*. Further, in determining whether grounds for personal jurisdiction exist pursuant to N.C.G.S. § 1-75.4(1)(d), "'the question of statutory authorization "collapses into the question of whether [a defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process[,]'" which we next analyze. *Brown*, ___ N.C. App. at ___, 681 S.E.2d at 387.

D. Due Process

L'Isolante argues that "the exercise of personal jurisdiction over L'Isolante . . . is inconsistent with due process." The trial court exercised specific personal jurisdiction over L'Isolante. L'Isolante contends this was error, on the grounds that there were insufficient contacts with North Carolina and that L'Isolante had no reason to anticipate being haled into court in North Carolina.

Due process requires that, in order to subject an out-of-state defendant to personal jurisdiction, that the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of

fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (citation omitted). Further, "there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[.]" *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citation omitted). A defendant's relationship with the forum state must be "such that he should reasonably anticipate being haled into court there.'" *Id.* (citations omitted).

Jurisdiction arising from our long-arm statute may be either general or specific. *Id.* at 366, 348 S.E.2d at 786. Specific jurisdiction involves the exercise of personal jurisdiction where the cause of action "arises out of the defendant's contacts with the forum state[.]" *Id.* "In this situation, the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction." *Id.* With respect to specific jurisdiction, "a defendant has 'fair warning' that he may be sued in a state for injuries arising from activities that he 'purposefully directed' toward that state's residents." *Id.* (citations omitted).

To determine whether sufficient minimum contacts exist to allow the exercise of personal jurisdiction, we scrutinize "the particular facts of each case." *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 284, 350 S.E.2d 111, 114 (1986). A determination of minimum contacts is a question of fact. *Watson v. Graf Bae Farm*,

99 N.C. App. 210, 211, 392 S.E.2d 651, 652 (1990).

Our courts look at the following factors in determining whether minimum contacts exist: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties.

Banc of Am. Secs. LLC v. Evergreen Int'l. Aviation, Inc., 169 N.C. App. 690, 696, 611 S.E.2d 179, 184 (2005).

L'Isolante cites no authority to support its contention that the trial court erred in finding sufficient contacts. Instead, L'Isolante merely recites the rules of law set forth above and argues that, based on those rules, the trial court made the wrong conclusions of law. Conducting a *de novo* review, we conclude that L'Isolante had sufficient minimum contacts with North Carolina to satisfy due process. In so concluding, we consider the breadth of activities L'Isolante engaged in within North Carolina, in particular: (1) L'Isolante entered into negotiations with Nomaco, Inc. for the formation of K-Flex with the intention of L'Isolante's becoming the sole owner of K-Flex; (2) L'Isolante and its agents entered into negotiations with Bostic to arrange Bostic's change of employment from Plaintiff to K-Flex; (3) agents of L'Isolante were involved in significant electronic communication with Bostic while Bostic was within North Carolina; (4) agents of L'Isolante were present within North Carolina on numerous occasions as part of the process of negotiating with Bostic; (5) L'Isolante employed a North Carolina law firm to review Bostic's employment contract for potential disclosure issues; and (6) L'Isolante's relationship with

K-Flex involved significant sharing of the R&D department and resources as well as the sale and use of L'Isolante's products solely by K-Flex within North Carolina. See *ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 669, 386 S.E.2d 766, 768 (1990) (holding the following contacts sufficient to justify personal jurisdiction over a foreign corporation: The "defendant [corporation] . . . engaged in several North Carolina business arrangements" and on "three occasions . . . entered the state and conducted relations with North Carolina businesses.").

Based on these substantial contacts, we hold that the contacts by L'Isolante in North Carolina were "such that [L'Isolante] should [have] reasonably anticipate[d] being haled into court [here]." *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (citation omitted). Considering the nature of the contacts and the claims at issue, we hold that the trial court's exercise of personal jurisdiction over L'Isolante does not offend traditional notions of fair play and substantial justice and is, therefore, consistent with due process. We therefore affirm the trial court's order denying L'Isolante's motion to dismiss for lack of personal jurisdiction.

IV. Preliminary Injunction

A. Trade Secrets

Plaintiff filed a motion for a preliminary injunction on 13 March 2009 against L'Isolante and K-Flex, seeking to prohibit either company from "developing, marketing or selling" certain insulation products or "any other product that derives, in whole or

in part, from trade secrets owned or licensed by [Plaintiff.]" In its memorandum in support of its motion for preliminary injunction, Plaintiff alleged the following facts in addition to those set forth above:

During the [period after Bostic was hired by K-Flex, but before he began work with K-Flex], a period of months when Bostic's commitment to K-Flex was unknown to Plaintiff, Bostic remained employed at Plaintiff, where he had access to the company's most sensitive trade secrets and proprietary information. He proceeded to download and steal thousands of data files. The data is so sensitive and extensive, it is like Plaintiff's DNA; in the hands of a third-party, it could be used to replicate Plaintiff's business and its proprietary products.

Plaintiff further asserted that K-Flex was struggling to compete with Plaintiff in the sale of two-inch-thick pipe insulation. Plaintiff contended that L'Isolante and K-Flex were producing a one-inch and a two-inch-thick pipe insulation reliant on nitrile butadiene rubber and polyvinyl chloride (NBR/PVC). Plaintiff, on the other hand, was producing two-inch insulation based on ethylene propylene diene methylene (EPDM). An alleged crucial difference between the materials produced by Plaintiff and those marketed by L'Isolante and K-Flex is that Plaintiff's EPDM insulation was capable of "obtain[ing] the necessary rating on the E84 fire test which [was] required by building codes." Plaintiff asserted that L'Isolante's NBR/PVC insulation was unable to pass the E84 fire test, and that "finding a solution to the E84 fire test ha[d] been a goal of [K-Flex]."

K-Flex management personnel had been requesting that

L'Isolante and Marengi develop a solution to the E84 fire test. Marengi told K-Flex that L'Isolante was working towards a solution, but that it had been unable to develop one. Prior to Bostic's arrival at K-Flex, L'Isolante was not distributing products based on EPDM. Plaintiff asserted that L'Isolante R&D officials in Italy, including Marengi, instructed Bostic, upon starting his employment at K-Flex, to begin work on NBR/PVC insulation with respect to the E84 fire test.

During Bostic's initial testing at K-Flex, notes from his laboratory work revealed references to "EPDM Tube & Sheet . . . 1349 . . . mixing, formula, processing, physicals." In its memorandum in support of its motion for a preliminary injunction, Plaintiff asserted that: "'Tube & Sheet' refer[red] to the form of insulation, and '1349' [was] *Plaintiff's* internal reference number for *its* 2-inch EPDM insulation product that passe[d] the E84 fire test." [emphasis in original]. K-Flex officials confirmed that the number 1349 was not related to K-Flex's business.

While Bostic was employed by Plaintiff, he was "Plaintiff's project leader for development of EPDM-based [products]." Plaintiff further asserted that information on Plaintiff's EPDM development process "was among the trade secrets that Bostic stole from Plaintiff[,] . . . includ[ing] the master batch formula for an EPDM product with [an E84 fire test passing] rating." Plaintiff asserted that, prior to Bostic's working with L'Isolante and K-Flex, none of their samples submitted for E84 fire testing were based on EPDM; rather, all samples were based on NBR/PVC. However,

in December 2008, L'Isolante sent samples to K-Flex for E84 fire testing which contained EPDM-based insulation.

Despite the fact that the previous market competition was for two-inch insulation, the batch sent by L'Isolante for fire testing contained one-inch EPDM samples. Plaintiff asserted that the data stolen by Bostic included "the master batch formula for Plaintiff's 1-inch EPDM product." Plaintiff emphasized the fact that "K-Flex ha[d] no commercial need for a 1-inch EPDM sample . . . [but], [i]f the 1-inch EPDM-based sample passe[d] the E84 fire test, a chemist [could] use the formula to develop a 2-inch EPDM-based sample that [would] pass the E84 [fire] test."

Based on Plaintiff's allegations, and the evidence submitted to the trial court under seal, the trial court granted Plaintiff's motion for a preliminary injunction.

B. Standard of Review

In order for a preliminary injunction to issue, the requesting party must show: (1) that it is likely to suffer irreparable harm if the injunction is not issued; and (2) that it has a likelihood of success in the accompanying action. *A.E.P. Industries v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983). Our Court applies the following standard of review to a trial court's ruling on a preliminary injunction:

In reviewing a trial court's grant of a preliminary injunction, "an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." . . . However, while an appellate court is not bound by the findings or ruling of the lower court, there is a presumption that the lower court's decision was correct, and the

burden is on the appellant to show error. . . . Thus, "a decision by the trial court to issue or deny an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings."

Precision Walls, Inc. v. Servie, 152 N.C. App. 630, 635-36, 568 S.E.2d 267, 271 (2002) (citations omitted).

_____C. Likelihood of Success

_____Defendants first contend that the trial court erred by concluding that Plaintiff demonstrated a likelihood of success. The trial court based its determination of Plaintiff's likelihood of success on the North Carolina Trade Secret Protection Act. N.C. Gen. Stat. § 66-152(3) defines "trade secret" as

business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

- a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by 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.

N.C. Gen. Stat. § 66-152(3) (2009). Subject to certain exceptions, "actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action[.]" N.C. Gen. Stat. § 66-154(a) (2009). A "misappropriation" is an "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade

secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C.G.S. § 66-152(1).

N.C. Gen. Stat. § 66-155 sets forth the requirements of proving a claim of misappropriation:

Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:

- (1) Knows or should have known of the trade secret; and
- (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

This prima facie evidence is rebutted by the introduction of substantial evidence that the person against whom relief is sought acquired the information comprising the trade secret by independent development, reverse engineering, or it was obtained from another person with a right to disclose the trade secret. This section shall not be construed to deprive the person against whom relief is sought of any other defenses provided under the law.

N.C. Gen. Stat. § 66-155 (2009).

The trial court concluded that "Plaintiff has shown a likelihood of success on the merits. Based on the evidence, Plaintiff . . . established a *prima facie* case of misappropriation of trade secrets, thus shifting the burden to . . . Defendants." The trial concluded that "the burden . . . shifted to Defendants to show by way of 'substantial evidence' that they developed the EPDM samples 'by independent development,' 'reverse engineering,' or that they 'obtained [it] from another person with a right to

disclose the trade secret.'. . . Defendants have not carried this burden." (quoting N.C.G.S. § 66-155).

i. Plaintiff's Prima Facie Case

_____ Defendants argue that the trial court erred in determining that Plaintiff established a prima facie case for misappropriation of a trade secret. Defendants argue that Plaintiff's "speculative claims of misappropriation were insufficient to sustain its burden of proof in the face of strong evidence of independent development from L'Isolante and K-Flex." Defendants contend that "while the evidence demonstrated that Bostic took a significant amount of data from [Plaintiff's] computer system, [Plaintiff] did not show that L'Isolante or K-Flex had a specific opportunity to acquire [Plaintiff's] '1349' formula or other EPDM information from Bostic."

_____ As stated above, a prima facie case for misappropriation of a trade secret can be shown by substantial evidence of the following:

[T]hat the person against whom relief is sought both:

- (1) Knows or should have known of the trade secret; and
- (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C.G.S. § 66-155. "Direct evidence . . . is not necessary to establish a claim for misappropriation of trade secrets; rather, such a claim may be proven through circumstantial evidence." *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 658,

670 S.E.2d 321, 329 (2009).

In the case before us, the trial court concluded that Plaintiff had "shown that Defendants knew or should have known of the trade secrets and Defendants had a specific opportunity to acquire the trade secret for their own use." In support of this conclusion, the trial court cited the following evidence:

The evidence shows that L'Isolante and K-Flex are now working on an EPDM based product. L'Isolante and K-Flex had not developed any functional EPDM based products before Bostic left [Plaintiff] and began working at K-Flex. Prior to Bostic's leaving [Plaintiff], it is alleged he misappropriated proprietary information and trade secrets, including [Plaintiff's] master batch formula for its 1-inch EPDM product, a product L'Isolante and K-Flex are now attempting to produce. Bostic allegedly used CD burning software and an external hard drive to steal this information. In the face of these allegations, Bostic has pleaded the Fifth Amendment to the U.S. Constitution. Additionally, a pre-employment e-mail from Guarino specifically references Bostic's future work with EPDM, a product L'Isolante and K-Flex knew [Plaintiff] was using to produce a 2-inch insulation product. Furthermore, a lab notebook used by Bostic while working at K-Flex specifically referenced EPDM by [Plaintiff's] internal reference number, 1349. Shortly after making reference to EPDM by way of [Plaintiff's] internal reference number, Bostic traveled to Italy to meet with Marengi. Within one (1) year of this meeting, L'Isolante sent 1-inch EPDM samples to the U.S. for ASTM E84 fire testing.

In particular, we note that the evidence tended to show that: (1) Defendants were not developing an EPDM product prior to working with Bostic; (2) Bostic stole a one-inch EPDM batch sample from Plaintiff; and (3) though the market suggested a demand for a two-inch EPDM material, Defendants produced a one-inch sample within

one year of Bostic's theft from Plaintiff. This is sufficient circumstantial evidence to show Defendants' opportunity to acquire the trade secrets as well as Defendants' subsequent use thereof. *See Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222 (2005). We therefore affirm that section of the trial court's order determining that Plaintiff set forth a prima facie case of misappropriation of a trade secret.

ii. Burden Shift

Defendants contend that the trial court incorrectly determined that the burden of proof had shifted to Defendants upon Plaintiff's showing of a prima facie case of misappropriation. Defendants assert that "[a]pplying [N.C.G.S.] § 66-155 in such a way as to shift the burden of proof from [P]laintiff to [D]efendant[s] ignores the plain language of the statute."

Defendants' argument ignores our Court's interpretation of N.C.G.S. § 66-155; we have held that N.C.G.S. § 66-155 does contemplate this shift of the burden of proof. *See Combs & Associates, Inc. v. Kennedy*, 147 N.C. App. 362, 369, 555 S.E.2d 634, 639 (2001) (stating that initially the burden of proof rests with the owner who must establish a prima facie case of misappropriation and when the owner establishes a prima facie case, the burden of proof shifts to the defendant to rebut); *see also Sunbelt Rentals, Inc.*, 174 N.C. App. at 58, 620 S.E.2d at 229 (discussing the defendant's failure to present evidence to rebut the plaintiff's prima facie showing of misappropriation). In light of our Court's prior interpretations of N.C.G.S. § 66-155, we hold

that the trial court did not err in determining that the burden had shifted to Defendants to rebut Plaintiff's prima facie showing of misappropriation.

iii. Substantial Evidence

Defendants next argue that the trial court erred in concluding that Defendants did not present substantial evidence to rebut Plaintiff's prima facie showing of misappropriation. The trial court's order contains the following language:

Marenghi's affidavit does not adequately explain how L'Isolante and K-Flex were able to produce an EPDM product ready for ASTM E84 fire testing in less than one (1) year. Furthermore, the Marenghi affidavit does not give any specifics about independent development or reverse engineering with respect to an EPDM product capable of satisfying the ASTM E84 fire test.

Defendants assert that there existed substantial evidence in the record to support their contention that they had not misappropriated any of Plaintiff's trade secrets.

As stated above, in reviewing a trial court's ruling on a preliminary injunction, we are not bound by the trial court's findings; however, we review the record to determine "'if there is ample competent evidence to support the [trial court's] decision,'" presuming that the trial court did not err. *Precision Walls*, 152 N.C. App. at 635-36, 568 S.E.2d at 271 (citations omitted). As described above, we have concluded that the trial court did not err in its conclusion that Plaintiff set forth a prima facie case for misappropriation, or that the burden then shifted to Defendants to rebut this conclusion with substantial evidence.

On appeal, Defendants point to two sources of evidence in the record as "substantial evidence" sufficient to rebut Plaintiff's prima facie showing: (1) an affidavit from Marenghi and (2) an affidavit from Beth Flanagan, a former State Bureau of Investigation analyst. The Marenghi affidavit, to which the trial court refers in its order, contains the following language:

4. Insulation products based on EPDM have been on the insulation market for a long time. Many of the main manufacturers of flexible elastomeric foam have introduced, in the last ten years, one or more products based on EPDM. . . .
. . .
6. L'Isolante started the evaluation of EPDM foam technology in my R&D unit in Roncello in the year 2001.
. . .
19. The EPDM product which we introduced is not based on any formula or information from [Plaintiff].

Likewise, Flanagan asserted in her affidavit that she tested samples of "a rubber-like material; one was labeled 'Solar' and one was labeled 'Armacell.'" Comparing the samples, Flanagan averred that "[t]he two samples [she] tested did not 'match' or 'have a common source[']. . . . The two samples were different. . . . The differences were distinct." However, Flanagan's affidavit is unclear as to how the products labeled Solar are relevant to this case, or what the distinct differences she noticed signify with respect to Plaintiff's prima facie case.

We are not persuaded by Defendants' contention that the affidavits of Marenghi and Flanagan are sufficient evidence to

rebut Plaintiff's prima facie case for misappropriation. Reviewing the record, under the presumption that the trial court made the correct conclusion, we conclude that there existed "'ample competent evidence to support the decision, even though the evidence may be conflicting and [we] could substitute [our] own findings.'" *Precision Walls*, 152 N.C. App. at 635-36, 568 S.E.2d at 271. Specifically, Defendants have not persuaded us that the trial court erred in concluding that Marenghi's affidavit did not rebut Plaintiff's prima facie misappropriation case. The statement in Marenghi's affidavit that "[t]he EPDM product which we introduced is not based on any formula or information from [Plaintiff]" is insufficient to rebut Plaintiff's prima facie showing. In light of the foregoing, we conclude that Plaintiff did show a likelihood of success on the merits.

D. Irreparable Harm

Defendants next argue that the trial court erred by concluding that Plaintiff was likely to suffer an irreparable harm if the injunction did not issue. Defendants cite only two North Carolina cases in support of their arguments: *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 579 S.E.2d 449 (2003) and *Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 228 S.E.2d 478 (1976). These cases are inapposite.

In *Laboratories, Inc.*, our Court stated "[a]n injunction will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of a party." *Laboratories, Inc.*, 30 N.C. App. at 696, 228 S.E.2d at 486. While this statement is legally

correct, in the present case the trial court did not base its ruling on the fears, apprehensions, or anxieties of Plaintiff. Rather, the court based its ruling on the facts and circumstances surrounding the interactions between Plaintiff and Defendants. In *Laboratories, Inc.*, our Court upheld preliminary injunctions as to several actions by the defendants, and we found only one of three injunctions to be unsupported by motive to disclose or likelihood of release of the trade secret. *Id.* at 693-96, 228 S.E.2d at 485-86. Having held that Plaintiff has shown a prima facie case for misappropriation of trade secrets and harm already sustained, we find *Laboratories, Inc.* unrelated to the facts before us.

In *Analog Devices, Inc.*, our Court determined that the plaintiff had failed to show "sufficient evidence tending to show misappropriation is threatened or actually going to occur." *Analog Devices, Inc.*, 157 N.C. App. at 472, 579 S.E.2d at 455. We then ruled that, because the plaintiff had failed to show that a misappropriation had occurred or was going to occur, a preliminary injunction was improper. *Id.* As with *Laboratories, Inc.*, because we have found that Plaintiff has made a sufficient showing of misappropriation, *Analog Devices* is inapplicable to the case before us.

The trial court relied on this Court's opinion in *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 424 S.E.2d 226 (1993). In *Barr-Mullin*, we held:

In our belief, misappropriation of a trade secret is an injury of "such continuous and frequent recurrence that no reasonable redress can be had in a court of law." The very

nature of a trade secret mandates that misappropriation will have significant and continuous long-term effects. The party wronged may forever lose its competitive business advantage or, at the least, a significant portion of its market share. Furthermore, the amount of actual damages awarded for misappropriation is measured "by the economic loss or the unjust enrichment . . . whichever is greater." It is also significant that plaintiff seeks a permanent injunction. Our Courts have "consistently adhered to the proposition that where the principal relief sought is a permanent injunction, it is particularly necessary that the preliminary injunction issue." As plaintiff presented sufficient evidence to satisfy both tests for issuance of a preliminary injunction, we find the trial court acted correctly in issuing the preliminary injunction.

Barr-Mullin, 108 N.C. App. at 597, 424 S.E.2d at 230-31 (citations omitted); see also *Barker Indus. v. Gould*, 146 N.C. App. 561, 565-66, 553 S.E.2d 227, 230 (2001) ("It is also "well settled that an injunction will issue to prevent unauthorized disclosure and use of trade secrets and confidential information.""") (citation omitted).

Defendants also argue that the trial court erred in concluding that Plaintiff had no adequate remedy at law. Although Defendants cite case law from other state and federal courts that they urge us to find persuasive, they cite no controlling authority except for the mere proposition that a plaintiff must show that there is no adequate remedy at law. As the trial court noted, case law from out state is found in the decision of this Court in *Barr-Mullin*, where we held that "misappropriation of a trade secret is an injury of 'such continuous and frequent recurrence that no reasonable redress can be had in a court of law.'" *Barr-Mullin*, 108 N.C. App.

At 597, 424 S.E.2d at 230.

Defendants lastly contend the injunction was improper because it was not narrowly tailored, but cite no controlling authority in support of their contention. We cannot hold that the trial court erred in its determination that "[t]he amount of information taken from Armacell by Bostic was so large that an injunction cannot be narrowly tailored to the information taken." In light of *Barr-Mullin* and *Barker Indus.*, we uphold the trial court's determination that Plaintiff was likely to suffer irreparable harm and had no adequate remedy at law. We further uphold the scope of the injunction under N.C. Gen. Stat. § 1A-1, Rule 65 (2009). Defendants' arguments are overruled.

Thus, we have determined the following: Plaintiff established a prima facie showing of misappropriation of trade secrets; Defendants failed to rebut that prima facie showing with substantial evidence; Plaintiff therefore showed a likelihood of success on the merits. In light of the foregoing, and considering the very nature of the misappropriation of trade secrets, the law of this State authorizes the issuance of a preliminary injunction. We therefore uphold the trial court's order granting Plaintiff's motion for preliminary injunction.

Affirmed.

Judges STEELMAN and BEASLEY concur.

Report per Rule 30(e).