Opinion issued November 4, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00924-CV

GREEN GARDEN PACKAGING CO., INC AND GARDEN GOURMET FRESH FOODS, INC., Appellants

V.

SCHOENMANN PRODUCE COMPANY, INC., Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2007-56517

MEMORANDUM OPINION

Appellants, Green Garden Packaging Co., Inc. and Garden Gourmet Fresh Foods, Inc. (collectively, "Green Garden"), challenge the trial court's rendition of summary judgment in favor of appellee, Schoenmann Produce Company, Inc. ("Schoenmann"), in Green Garden's suit against Schoenmann for breach of contract, quantum meruit, misappropriation of trade secrets, and fraud. In seven issues, Green Garden contends that the trial court erred in concluding that Green Garden's breach of contract claim is barred by the statute of frauds, its quantum meruit claim fails for lack of expectation of "cash consideration," its "product information, forms, and samples" did not constitute "protected trade secrets," its fraud claim is barred by the statute of frauds, and this Court should remand the case to allow for discovery on Schoenmann's lost profits in regard to Green Garden's claim for profit disgorgement.

We affirm.

Background

Green Garden is a wholesale producer of fresh-cut vegetables, fruits, and ready-made products including salad kits. It develops and owns equipment, recipes, and manufacturing processes for use in producing these items. Schoenmann distributes fresh and packaged food items and produce to various clients, including the Houston Independent School District ("HISD"). In 2005, Schoenmann, to fulfill a produce contract it had with HISD, began purchasing food

items from Green Garden, including fresh-cut vegetables, fruits, and salad kits.

In its petition, Green Garden alleged that in the spring of 2007, when HISD was compiling competitive bids on the produce contract, Schoenmann asked Green Garden to provide its items "exclusively" to Schoenmann in exchange for Schoenmann's agreement to use Green Garden as the supplier of these items if HISD accepted Schoenmann's bid. Based upon this agreement, Green Garden provided Schoenmann "detailed written information on its products for use in preparing a bid to HISD." Green Garden prepared a confidentiality notice, which provided that Green Garden's information and product specifications were "confidential" and "proprietary," and then gave samples of its products to Schoenmann. Schoenmann then submitted the confidentiality notice and the samples to HISD.

Green Garden further alleged that the food items it provided were made according to strict specifications and processes developed over a number of years and these processes and specifications constituted valuable trade secrets. Also, its information and products had been a "key part" of Schoenmann's bid because no other local producer had been prepared to supply the required items and information. As a result, Schoenmann was the only distributor to submit a compliant bid, and Schoenmann won the HISD contract for a one-year term beginning in August 2007. However, Schoenmann did not purchase food items

from Green Garden to fulfill the HISD contract, and it shared Green Garden's specifications and confidential information with other suppliers.

Green Garden claimed that Schoenmann had breached its contract to purchase Green Garden products after using its trade secrets, samples, and other information in submitting the bid to HISD. In support of its quantum meruit claim, Green Garden asserted that it had exclusively provided Schoenmann with product information, specifications, and samples and had not been compensated. Green Garden also claimed that Schoenmann had misappropriated Green Garden's trade secrets under false pretenses and that Schoenmann had used Green Garden's trade secrets to assist other producers in developing products that Schoenmann had previously purchased from Green Garden. Green Garden further claimed that Schoenmann had fraudulently induced Green Garden into providing the information and specifications exclusively to Schoenmann, which represented that it would continue to use Green Garden as a supplier, and Green Garden relied upon Schoenmann's false statements in foregoing opportunities with other distributors.

Green Garden sought to recover as damages its anticipated lost profits in supplying products to Schoenmann for the minimum term of the HISD contract, which amounted to more than $200,000. Green Garden also sought to recover profits that Schoenmann wrongfully obtained by using Green Garden's products and trade secrets, which amounted to over $250,000. In regard to its quantum

meruit claim, Green Garden sought the reasonable value of the information and services it had provided.

Schoenmann denied Green Garden's allegations and asserted a counterclaim for malicious prosecution. Schoenmann then filed a motion for partial summary judgment on Green Garden's breach of contract claim, arguing that it was barred as a matter of law by the statute of frauds because the purported agreement involved a sale of goods in excess of $500[1] and because the purported agreement, which was allegedly formed in April 2007 for a minimum one-year term commencing in August 2007, was not performable within one year from the date of making.[2] In support of its summary judgment motion, Schoenmann attached the affidavit of Mark Steakley, an officer of Schoenmann. Steakley testified that in 2007, when HISD was compiling competitive bids on the contract, Schoenmann asked Green Garden and two other vendors to submit product samples, Schoenmann was awarded the HISD contract that commenced in August 2007 for a one-year term, and Schoenmann purchased items for this contract from a vendor other than Green Garden. Schoenmann also attached to its motion excerpts from the deposition testimony of Anthony Faour, Green Garden's president, who admitted that there was no written documentation of any agreement between Schoenmann and Green

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1 *See* TEX. BUS. & COM. CODE ANN. § 2.201 (Vernon 2009).

2 *See id*. § 26.01 (Vernon 2009).

Garden.

In its summary judgment response, Green Garden argued that the statute of frauds did not bar its breach of contract claim because the parties could have terminated or fully performed the agreement within one year of its inception and Green Garden had in fact partially performed the "the most valuable part of" the contract by exclusively "providing extensive proprietary information forms and samples" to Schoenmann. Green Garden attached to its response the affidavit of Anthony Faour, who testified that Schoenmann had contacted Green Garden for assistance, products, and information in preparing its bid to HISD, Green Garden was the only producer in the Houston market that had available the full complement of the products required by HISD and related information and forms, Schoenmann proposed an agreement whereby Green Garden would provide this information exclusively to Schoenmann in exchange for Schoenmann's agreement to use Green Garden as a supplier, and Faour agreed to this on behalf of Green Garden. Faour further testified that the "detailed written information required for the HISD bid" provided to Schoenmann by Green Garden was accompanied by the "notice of confidential and proprietary information," Schoenmann was the only distributor able to submit a bid to HISD with all required products and information, Schoenmann was awarded the contract, and, contrary to their agreement, Schoenmann did not subsequently purchase products from Green Garden or

compensate Green Garden for its assistance in the bidding process. After a hearing, the trial court granted Schoenmann's motion for partial summary judgment on Green Garden's breach of contract claim.

Schoenmann then filed a summary judgment motion on Green Garden's remaining claims of quantum meruit, misappropriation of trade secrets, and fraud. Schoenmann argued that Green Garden's quantum meruit claim failed as a matter of law because the summary judgment evidence established that Green Garden had provided its information and samples only in hopes of obtaining a future business relationship with Schoenmann and it had no reasonable expectation of compensation for the services and information it provided in the bidding process. Schoenmann asserted that, under this "fairly common scenario in which a party furnishes services or materials . . . in anticipation of a contract," the law prohibits quantum meruit recovery. Schoenmann also asserted that there is no evidence that Green Garden had expected compensation for the services and information it provided and no evidence of their value. Schoenmann noted that the only measure of recovery sought by Green Garden in its quantum meruit claim, i.e., its lost profits, is improper because it "would essentially amount to a commission based on the value of the HISD contract." Schoenmann also argued that Green Garden's claims for misappropriation of trade secrets failed as a matter of law because Green Garden had not provided Schoenmann with trade secrets and Schoenmann did not

use or disclose any trade secrets. Schoenmann asserted also that there is no evidence to support any of the elements of Green Garden's misappropriation of trade secrets claim. Finally, Schoenmann argued that Green Garden's fraud claim failed as a matter of law because a plaintiff like Green Garden, whose breach of contract claim is barred by the statute of frauds, cannot seek recovery of benefit-of-the-bargain damages through a fraud claim. Schoenmann asserted also that there is no evidence of damages other than the claimed benefit-of-the-bargain damages.

In its response to Schoenmann's motion, Green Garden asserted that quantum meruit recovery is allowed when a party expects compensation through a new business arrangement, evidence of lost profits may be used to establish quantum meruit damages, there is evidence that its information and products constituted trade secrets, and it was entitled to seek disgorgement of Schoenmann's profits under its fraud claim.

After a hearing, the trial court, without specifying the grounds upon which it relied, granted Schoenmann's summary judgment motion, ordering that Green Garden take nothing on its claims against Schoenmann. The trial court subsequently dismissed, without prejudice, Schoenmann's malicious prosecution counterclaim and entered a final judgment.

Standard of Review

To prevail on a summary judgment motion, a movant has the burden of

proving that it is entitled to judgment as a matter of law and that there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When a defendant moves for summary judgment, it must either (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of its affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey*, 900 S.W.2d at 341; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in its favor. *Id*. at 549.

To prevail on a no-evidence summary judgment motion, a movant must allege that there is no evidence of an essential element of the adverse party's cause of action or affirmative defense. TEX. R. CIV. P. 166a(i); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. *Gen. Mills Rests., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 832–33 (Tex. App.—Dallas 2000, no pet.). Although the nonmoving party is not required to marshal its proof, it must present evidence that raises a genuine issue of material

fact on each of the challenged elements. TEX. R. CIV. P. 166a(i); *see Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). A no-evidence summary judgment motion may not be granted if the nonmovant brings forth more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. *See Ridgway*, 135 S.W.3d at 600. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). When reviewing a no-evidence summary judgment motion, we assume that all evidence favorable to the nonmovant is true and indulge every reasonable inference and resolve all doubts in favor of the nonmovant. *Spradlin v. State*, 100 S.W.3d 372, 377 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

If the trial court's order granting summary judgment motion does not specify the grounds upon which the trial court relied, we must affirm the summary judgment if any of the grounds in the summary judgment motion are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995).

Breach of Contract

In its first issue, Green Garden argues that the trial court erred in granting summary judgment in favor of Schoenmann on its breach of contract claim on the

basis that the claim is barred by the statute of frauds because the contract could have been performed within one year, the contract is enforceable under the partial performance doctrine, and Green Garden partially performed on an "indivisible contract."

Whether the statute of frauds applies to bar Green Garden's breach of contract claim is a question of law. *Henriquez v. Cemex Mgmt., Inc.*, 177 S.W.3d 241, 250 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (holding that proffered writing did not satisfy statute of frauds as matter of law).

Schoenmann sought summary judgment under the statute of frauds (1) for a contract for the sale of goods for price of $500 or more, *see* TEX. BUS. & COM. CODE ANN. § 2.201 (Vernon 2009), and (2) for a contract not to be performed within one year from date of making. *See id*. § 26.01(b)(1) (Vernon 2009). Section 2.201, which applies to a sale of goods, provides,

> (a) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

See id. § 2.201(a). Here, it is undisputed that there is no writing evidencing the alleged agreement between Green Garden and Schoenmann. Moreover, the

summary judgment evidence conclusively establishes that the alleged agreement that Green Garden seeks to enforce against Schoenmann was for a sale of goods that exceeded $500. Thus, section 2.201 applies to bar Green Garden's breach of contract claim, unless an exception applies.

Section 2.201 provides several statutory exceptions to the application of the statute of frauds. *See id*. A contract for a sale of goods of $500 or more that does not satisfy the requirements of subsection (a) of section 2.201 but is valid in other respects is enforceable,

> (1) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
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> (2) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
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> (3) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 2.606).

See id. § 2.201(c)(1)-(3). However, none of these exceptions apply in this case. Green Garden did not specially manufacture any food items, Schoenmann has not admitted that a contract for sale of these food items was ever made, and there is no evidence that any payments were made or accepted or that any food items were

received or accepted by Schoenmann.

Green Garden asserts that it partially performed the contract[3]; "the essence of the agreement" was "the proprietary information, forms, and samples" it provided to Schoenmann during the bidding process; and, in its attempt to recover the lost profits from the produce contract, the "valuable consideration" it provided "could not possibly be separated apart from the goods that were then to be supplied if the HISD contract was obtained." However, the agreement on which Green

[3] Green Garden does not directly argue that any of the statutory exceptions to section 2.201 should apply, and instead suggests that we should recognize, in addition to these exceptions, a more expansive common law partial performance doctrine that would save its alleged agreement with Schoenmann from the statute of frauds. Green Garden asserts that a "majority of jurisdictions considering this issue have held the partial performance doctrine is applicable, at least with respect to indivisible contracts, for sales of goods of more than $500." First, the statutory exceptions in section 2.201 provide remedies for parties who, among other things, specially manufacture goods or provide goods that have been received and accepted. TEX. BUS. & COM. CODE ANN. § 2.201(c)(1), (3). Thus, section 2.201 already contemplates some measure of relief for a party invoking a partial performance defense. However, none of the statutory exceptions apply to Green Garden's alleged contract with Schoenmann because Green Garden is not seeking to recover for any goods that is has provided, but instead is seeking to compel Schoenmann to purchase goods from it in excess of $500 for a minimum one year term. Second, to the extent other jurisdictions have adopted a broader partial performance exception, there is no Texas authority for doing so, and we decline to adopt such an exception on these facts. Third, the majority of authorities cited by Green Garden in support of a broader common law partial performance exception arise from the factually distinguishable scenario involving a partial or installment payment for an indivisible good, like a car or boat. *See, e.g., Thomaier v. Hoffman Chevrolet, Inc.*, 410 N.Y.S.2d 645 (N.Y. App. Div. 1978).

Garden seeks recovery is, at its core, an agreement that would have required Schoenmann to purchase food items, valued well in excess of $500, from Green Garden for a minimum of a one-year term. Although Green Garden has presented evidence that it exclusively provided Schoenmann with information and samples of its products in the course of the bidding process, and although Green Garden asserts that it did this pursuant to an agreement with Schoenmann, the only consideration Green Garden sought under its alleged agreement was Schoenmann's purchase of goods from Green Garden. Such a contract plainly falls within section 2.201(a), and, without a writing to evidence the agreement, it is unenforceable under the statute of frauds. *See id*. § 2.201. Accordingly, we hold that the trial court did not err in granting summary judgment on Green Garden's breach of contract claim.

We overrule Green Garden's first issue.

Quantum Meruit

In its second and third issues, Green Garden argues that the trial court erred in granting summary judgment in favor of Schoenmann on its quantum meruit claim because it provided services and information to Schoenmann in exchange for the promise of future business and because it presented sufficient evidence to support the elements of its quantum meruit claim.

Quantum meruit provides an equitable remedy which does not arise out of a

contract, but is independent of it. *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990). Founded on unjust enrichment, quantum meruit "will be had when non payment for the services rendered would result in an unjust enrichment to the party benefited by the work." *Id*. "Quantum meruit 'is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted.'" *Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 815 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Campbell v. Nw. Nat'l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex. 1978)).

To recover under quantum meruit, a claimant must prove that (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged and were used and enjoyed by him; (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged. *Vortt Exploration Co.*, 787 S.W.2d at 944; *Speck*, 235 S.W.3d at 815. The expected payment need not be monetary and may be in "any form of compensation." *Vortt Exploration Co.*, 787 S.W.2d at 945. However, a party seeking to recover on a claim of quantum meruit must introduce evidence on the correct measure of damages, which is the reasonable value of the work performed or the materials furnished. *M.J. Sheridan & Son Co. v. Seminole Pipeline Co.*, 731 S.W.2d 620,

624–25 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Johnston v. Kruse*, 261 S.W.3d 895, 902 (Tex. App.—Dallas 2008, no pet.); *LTS Group, Inc. v. Woodcrest Capital, L.L.C.*, 222 S.W.3d 918, 920—921 (Tex. App.—Dallas 2007, no pet.); *see also City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 10 n.7 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (comparing damages available under breach of contract and quantum meruit claims and noting that proper measure of damages for breach of contract "is just compensation for the loss or damage actually sustained, commonly referred to as the benefit of the bargain," while "proper measure of damages for a claim in quantum meruit is the reasonable value of work performed and the materials furnished").

Schoenmann sought summary judgment on Green Garden's quantum meruit claim on a number of grounds. We need only consider Schoenmann's no-evidence summary judgment motion, in which Schoenmann asserted that Green Garden presented no evidence of the value of the alleged services, information, and goods it provided.[4] In its summary judgment response and on appeal, Green Garden

[4] Schoenmann also argued that it was entitled to summary judgment on Green Garden's quantum meruit claim because the law prohibits recovery under quantum meruit to a party who provides services or goods merely "in hopes of obtaining a future business relationship" and, "as a matter of law," Green Garden had no reasonable expectation of "cash compensation" for materials or services furnished prior to HISD awarding the contract. *See Peko Oil USA v. Evans*, 800 S.W.2d 572, (Tex. App.—Dallas 1990, writ denied). However, as noted above, the Texas Supreme Court has made clear that an expected payment need not be monetary and may be in "any form of

recognizes that "the measure of damages in quantum meruit is not lost profit in itself" but instead the "reasonable value of the services" performed. Yet, Green Garden asserts that the lost profits that it expected to earn as a supplier to Schoenmann "are the best, *if not the only*" measure of the value of services that it rendered. (Emphasis added.) Green Garden makes clear in its briefing to this Court, as it did in its pleadings filed with the trial court below, that the only measure of damages it seeks to recover is the full value of the expected profits it allegedly lost as a result of Schoenmann not using it as the supplier for the HISD contract. Green Garden argues that it is entitled to this amount of damages on its quantum meruit claim because "the lost profits from that contract are what the parties anticipated as consideration for Green Garden's services."

The only evidence offered in the trial court by Green Garden concerning its damages on its quantum meruit claim was its anticipated profits under the HISD

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compensation." *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 945 (Tex. 1990). In *Vortt*, the plaintiff seeking quantum meruit recovery had furnished certain information to the defendant "with the expectation that a joint operating agreement would be reached." *Id.* The court noted that the parties had negotiated for four years trying to reach a joint operating agreement and the plaintiff presented testimony that it had shared the confidential information based only upon the belief that such an agreement would be reached. *Id.* Thus, the reasoning of *Vortt* supports Green Garden's assertion that, in certain circumstances, a party that provides services with the expectation of entering into a future business agreement may seek recovery of the value of those services under a claim for quantum meruit, provided that party presents evidence in support of all other elements of the claim.

contract. This amount of damages, which, if awarded, would grant Green Garden the full value of the HISD contract, is not a proper measure of damages for a quantum meruit claim.[5] Although lost profits may be a relevant factor in calculating the value of services rendered in certain circumstances, here, by seeking only this measure of damages, Green Garden has failed to present any evidence of the reasonable value of the services that it actually provided to Schoenmann. *See LTS Group, Inc.*, 222 S.W.3d at 921 (concluding that (1) plaintiff seeking quantum meruit recovery presented no evidence as to value of due diligence materials it generated and delivered to defendant and (2) reference to what fee broker might have generally charged in real estate transaction provided no evidence of reasonable value of work performed and materials actually furnished by plaintiff). Because Green Garden presented no evidence of quantum meruit damages, we hold that the trial court did not err in granting summary judgment on Green Garden's quantum meruit claim.

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[5] A plaintiff seeking quantum meruit recovery must introduce evidence regarding the value of services it provided. *LTS Group, Inc. v. Woodcrest Capital, L.L.C.*, 222 S.W.3d 918, 920–921 (Tex. App.—Dallas 2007, no pet.). Plaintiffs have satisfied this burden in other quantum meruit cases by providing specific testimony about the amount of compensation to which they would be entitled for the services rendered. *See, e.g., Lamajak, Inc. v. Frazin*, 230 S.W.3d 786, 795–96 (Tex. App.—Dallas 2007, no pet.). Thus, a plaintiff seeking quantum meruit recovery must present evidence on the value of services it provided, i.e., a restitution measure of damages, rather than evidence of damages based upon any alleged benefit of an expected bargain.

We overrule Green Garden's second and third issues.

Trade Secrets

In its fourth and fifth issues, Green Garden argues that the trial court erred in granting summary judgment on its misappropriation of trade secrets claim because its "product information, forms, and samples" constituted "protected trade secrets" and it presented evidence to support each of the elements of its claim for misappropriation of trade secrets. Schoenmann responds that the trial court could have properly granted its no-evidence summary judgment motion because Green Garden presented no evidence that a trade secret existed, Schoenmann used or disclosed any alleged trade secrets, or Schoenmann breached a confidential relationship or improperly discovered the alleged trade secret. Alternatively, Schoenmann argues that the trial court could have properly granted its summary judgment motion on the ground that the evidence established as a matter of law that Green Garden's alleged trade secrets "related to generic recipes" and other information already in the public domain, Schoenmann did not use or disclose Green Garden's information, and Green Garden was not damaged.

A plaintiff may recover for misappropriation of a trade secret by establishing that (1) a trade secret existed; (2) the trade secret was acquired through a breach of a confidential relationship or was discovered by improper means; (3) the defendant used the trade secret without the plaintiff's authorization; and (4) the plaintiff

suffered damages as a result. *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 366–67 (Tex. App.—Dallas 2009, pet. denied); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex. App.—Austin 2004, pet. denied). Improper means of acquiring trade secrets include theft, fraud, inducement of or knowing participation in a breach of confidence, and other means either wrongful in themselves or under the circumstances. *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 636 (Tex. App.—Fort Worth 2007, pet. denied).

A trade secret may consist of any formula, pattern, device, or compilation of information used in one's business that provides an opportunity to obtain an advantage over competitors who do not know or use it. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996). Items such as customer lists, pricing information, client information, contacts, market strategies, blueprints, and drawings have all been shown to be trade secrets. *Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co.*, 764 S.W.2d 274, 276–79 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Tex. Integrated Conveyor Sys., Inc.*, 300 S.W.3d at 367; *Rugen v. Interactive Bus. Sys., Inc.*, 864 S.W.2d 548, 552 (Tex. App.—Dallas 1993, no writ). Use of a trade secret means commercial use, by which a person seeks to profit from the use of the secret. *Global Water Group, Inc. v. Atchley*, 244 S.W.3d 924, 930 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Atl. Richfield Co. v.*

Misty Prods., Inc., 820 S.W.2d 414, 422 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

In support of its claim that its information, forms, and samples constituted trade secrets, Green Garden relies on two pieces of evidence. First, Green Garden cites Faour's testimony that it made its food items according to strict specifications and processes developed over a number of years, Green Garden has carefully protected these trade secrets from public disclosure, and Green Garden's salad kits are "extraordinarily difficult to design and produce." Green Garden also cites Faour's testimony that Green Garden was asked to provide HISD with product sample tracking and verification forms, nutrient and ingredient documentation, lists of product contents with weights and labeling, and a nutritional panel compliant with federal standards; Green Garden provided this information on more than thirty products; and the set of forms for each product included a notice that such information was confidential and proprietary. Second, Green Garden relies on the confidentiality notice that it provided to Schoenmann and which Schoenmann included in its HISD bid.

In support of its claim that Schoenmann misappropriated its trade secrets, Green Garden relies on Faour's affidavit testimony that Schoenmann used Green Garden's "recipes and other proprietary information" in submitting its bid to HISD. Green Garden asserts that it "believes" its recipes were used by other

producers, although it does not cite any evidence in the record in support of that belief. Green Garden states in its briefing that these other producers used by Schoenmann "may *or may not* have used their own recipes." (Emphasis added.)

Despite Green Garden's own characterization of its recipes, samples, forms, manufacturing processes and other information as trade secrets, there is no evidence in the record that Green Garden actually possessed any trade secrets or that it, in supplying the required information for the purposes of the HISD bid, disclosed any of its trade secrets to Schoenmann. The testimony of the HISD employees establishes that distributors like Schoenmann were required to submit a bid based upon HISD's list of specific food items. Schoenmann then contacted vendors, including Green Garden, for assistance in preparing its bid. But Green Garden does not point to any evidence in the record, other than Faour's general testimony, establishing that the information actually conveyed by Green Garden to Schoenmann consisted of trade secrets. The record demonstrates that Green Garden, as a vendor of fresh-cut vegetables and various food items including salad kits, disclosed information associated with the bidding process related to the ingredients and nutrition contents of the submitted food items. But there is no evidence that Green Garden provided to Schoenmann design specifications or other information that it had "developed" over the course of several years that was not otherwise available in the public domain. The mere fact that Green Garden

included a confidentiality notice, which Schoenmann subsequently furnished to HISD, does not constitute evidence that Schoenmann acknowledged that Green Garden actually provided it with trade secrets. There is nothing attached to the confidentiality notice contained in the record before us that would create a fact issue on the existence of a trade secret.

Moreover, even if Faour had provided testimony to create a fact issue on the existence of a trade secret, there is nothing in the record to show that Schoenmann actually disclosed any trade secrets or used them in any way. Faour's affidavit testimony, which is Green Garden's primary piece of summary judgment evidence, did not address Schoenmann's alleged disclosure of Green Garden's information to other vendors. In fact, the only evidence in the record pertaining to Green Garden's misappropriation of trade secrets allegation is Faour's deposition testimony that he had no information to support his belief that Schoenmann had shared Green Garden's information with other vendors or producers.

Accordingly, we hold that the trial court did not err in granting Schoenmann's no-evidence summary judgment motion on Green Garden's claim for misappropriation of trade secrets.

We overrule Green Garden's fourth and fifth issues.

Fraud

In its sixth and seventh issues, Green Garden argues that the trial court erred

in granting Schoenmann summary judgment on its fraud claim because it is not barred by the statute of frauds and Green Garden is entitled to discovery regarding Schoenmann's lost profits to seek the remedy of "profit disgorgement."

If the statute of frauds bars Green Garden's claim for benefit-of-the bargain damages resulting from the alleged breach of contract, then Green Garden is similarly precluded from seeking its benefit-of-the-bargain damages through its fraud claim. *See Quigley v. Bennett*, 227 S.W.3d 51, 54 (Tex. 2007); *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007). Green Garden does not challenge this point. Rather, it argues that it is entitled to seek the disgorgement of Schoenmann's profits as a remedy for Schoenmann's alleged fraud. However, as Green Garden admits, the record contains no evidence of Schoenmann's profits. Thus, the trial court could have properly granted Schoenmann's no-evidence summary judgment motion on Green Garden's fraud claim on the ground that Green Garden failed to present any evidence of a viable measure of damages for its fraud claim. TEX. R. CIV. P. 166a(i).

Green Garden, recognizing this evidentiary deficiency, asks us to remand the case to the trial court to allow for discovery on Schoenmann's profits. Green Garden asserts that the lack of evidence in support of its disgorgement claim is attributable to the fact that, "pending a ruling on summary judgment, the [trial] court did not allow discovery of Schoenmann's profits from the HISD Contract."

Green Garden notes that in a motion for continuance included with its summary judgment response, it asked the trial court to continue the hearing on Schoenmann's summary judgment motion because "necessary discovery had not been completed."

The trial court signed its summary judgment order disposing of Green Garden's fraud claim on July 9, 2009 and its final judgment on September 22, 2009. There is nothing in the record indicating whether the trial court ever ruled on either Green Garden's motion for continuance or its motion to compel information on Schoenmann's profits. Within its summary judgment response, Green Garden represented that the motion to compel had been set for hearing on March 11, 2009. Without anything in the record to reflect that the trial court ruled on these two matters, or refused to rule on these matters, there is nothing for us to review.[6] *See* TEX. R. APP. P. 33.1.

Additionally, although the trial court's orders pertaining to discovery are not contained in the record before us, Green Garden filed its amended petition adding its fraud claim in September 2008. According to representations in the summary judgment briefing, the trial court had extended the discovery deadline at least once

[6] Schoenmann filed its summary judgment motion on Green Garden's fraud claim on April 3, 2009 and Green Garden filed its response on May 1, 2009. The trial court's order granting summary judgment, signed on July 9, 2009, contains a recital that it heard the motion on June 15, 2009, apparently after the setting on the motion to compel.

until March 15, 2009. Even construing Green Garden's appellate complaint liberally, based upon this record, we cannot say that the trial court granted Schoenmann's no-evidence summary judgment before "an adequate time for discovery" had passed. *See* TEX. R. CIV. P. 166a(i). Because Green Garden presented no evidence in support of its claimed damages with regard to its fraud claim, and because the record supports a finding that adequate time for discovery had passed at the time the trial court granted summary judgment, we hold that the trial court did not err in granting Schoenmann's no-evidence summary judgment on Green Garden's fraud claim.

We overrule Green Garden's sixth and seventh issues.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Alcala, and Massengale.