

Affirmed and Memorandum Opinion filed January 26, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00633-CV

GENERAL INSULATION COMPANY, Appellant

V.

DANIEL L. KING, Appellee

**On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2006-71028**

MEMORANDUM OPINION

In this misappropriation-of-trade-secrets and breach-of-contract case, appellant General Insulation Company (“General”) appeals from the trial court’s summary judgment in favor of appellee Daniel L. King. Determining King conclusively negated at least one essential element of each of General’s causes of action, we affirm.

I

General sells insulation materials to mechanical and plumbing contractors. King, after approximately ten years with Specialty Products and Insulation (“SPI”), began working for

General in January 2005, first as the assistant branch manager then as branch manager in its Houston office. At the beginning of his employment with General, King signed an “Agreement Concerning Propriety Information” (“the Agreement”). The Agreement provided in part:

CONFIDENTIALITY

With respect to the information, projects, practices, customer contacts, potential customers, methodologies and management philosophy relating to COMPANY, and also with respect to all other information, whatever its nature and form and whether obtained orally, by observation, from graphic materials, or otherwise (except such as is generally available by publication) obtained by me during or as a result of my employment by the COMPANY and relating to any product, process, or apparatus or to any use of any of them, or to materials, tolerances, specifications, costs (including manufacturing costs), prices or to any plans of COMPANY or any subsidiary thereof, I agree:

A. to hold all such information, projects, practices, customer contacts, potential customers, methodologies, process, apparatus, costs (including manufacturing costs), prices, plans and management philosophy in strict confidence and not in publish or otherwise disclose any thereof except with the prior consent of an authorized representative of the COMPANY;

.....

D. . . . upon request of the COMPANY to deliver to it all graphic materials, reports, computer disks and the like containing or relating to any such information, projects, practices, customer contacts, potential customers, methodologies, process, apparatus, costs (including manufacturing costs), prices, plans and management philosophy

CONTINUING OBLIGATION

My obligations under this Agreement hereof shall remain in effect throughout my employment by the Company, and ever thereafter

On September 5, 2006, King informed General he was resigning. At that time, King told General’s operations manager, Ann Shirey, that he had already packed, having retrieved his belongings the previous Saturday. Shortly after King left the premises, Shirey inventoried King’s office. She observed that certain documents, such as the price book that had

previously been in King's office, were no longer there. According to Shirey, there was "quite a bit missing," including King's telephone files and his customer-contact list.

Shortly after leaving General, King began working as division manager for Bay Insulation Systems of Texas, Inc. ("Bay"), a competitor of General. According to Shirey, General became aware King was providing quotes to General's customers for insulation material from Bay. Shirey testified General's quotes and the quotes King made to clients on behalf of Bay were "within pennies of each other per item." She also testified that, before King's departure from General, one of General's customers, Houston Insulation, had not done any business with Bay. After King left General, however, Bay began to do business with Houston Insulation, and General lost projects to Bay that it would otherwise have received from Houston Insulation. Additionally, a number of General's other customers that had not done any or much business with Bay before King's departure to Bay, began doing business with Bay.

In November 2006, General sued King, seeking damages and injunctive relief for "wrongful use of confidential information under common law" (misappropriation of trade secrets) and for breach of contract. The confidential and proprietary information on which General based its claims included its customer-contact lists and its pricing formulas and schedules.

King moved for partial summary judgment on General's claims. King contended his proof conclusively established he did not take the information in question and that neither the customer lists nor the pricing information was confidential, proprietary, or a trade secret. King's summary-judgment proof consisted of his affidavit and the depositions of Shirey and another General regional manager, Mark Snodgrass. General responded. Its summary-judgment proof consisted of excerpts from Shirey's and Snodgrass's depositions and exhibits from King's deposition.

The trial court granted King’s motion for partial summary judgment and ordered that General’s claims against King be dismissed with prejudice. The court subsequently entered final judgment disposing of all claims.¹

II

In a single issue, General argues the trial court erred in granting King’s motion for traditional summary judgment. We review the trial court’s grant of summary judgment de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156–57 (Tex. 2004). In a traditional summary judgment, the movant bears the burden to show there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *Aguirre v. Vasquez*, 225 S.W.3d 744, 750 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Thus, when a defendant moves for traditional summary judgment, he must conclusively negate at least one essential element of each of the plaintiff’s causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Shirvanian v. DeFrates*, 161 S.W.3d 102, 106 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

We take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant’s favor. *Joe*, 145 S.W.3d at 157; *Aguirre*, 225 S.W.3d at 750. We review a summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 568 (Tex. 2006) (per curiam) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 & 23 (Tex. 2005)).

When, as here, the trial court does not specify in its order the grounds on which it relied in granting summary judgment, we must affirm the summary judgment if any of the

¹ King had counterclaimed for declaratory judgment. King and General filed cross-motions for summary judgment on King’s counterclaim. The court denied King’s motion and granted General’s. King has not appealed.

grounds presented has merit. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005); *Chappell Hill Bank v. Smith*, 257 S.W.3d 320, 324 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Thus, to prevail on appeal, General must show that each of King’s summary-judgment grounds is meritless. See *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

In the present case, General pleaded two claims: (1) common-law misappropriation of trade secrets and other confidential information; and (2) breach of the Agreement. General based both claims on King’s alleged disclosure or use of two types of information—client-contact information and pricing information specific to individual clients.² In his summary-judgment motion, King argued two grounds in relation to each of these claims: (1) King did not take or misappropriate any information; and (2) the information in question was not confidential or proprietary under the Agreement and not a “trade secret.”

III

In the following discussion, we first set forth the elements of each of General’s causes of action. We then consider King’s summary-judgment motion and proof as it relates to each of the two types of information—the client contacts and the customer-specific pricing data.

A

Misappropriation of trade secrets. The elements of a common-law misappropriation claim are: (1) existence of a trade secret; (2) breach of a confidential relationship or improper discovery of a trade secret; (3) use of the trade secret; and (4) damages. *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex. App.—Austin 2004, pet. denied). Before there can be a “trade secret,” there must be a substantial element of secrecy. *Id.* at

² General’s petition may be read as referring to general client and pricing information. On appeal, however, General relies on client-contact information (i.e., the specific contact person within a business) and customer-specific pricing information (i.e., specific prices quoted to individual clients).

467. Factors relevant to determining whether a trade secret exists include (1) the extent to which the information is known outside the party's business, (2) the extent to which it is known by employees and others within the business, (3) the extent of measures taken by the party to guard the secrecy of the information, (4) the value of the information to the business and its competitors, (5) the amount of effort or money expended to develop the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Lowe's Cos.*, 134 S.W.3d 876, 878 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding) (citing *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003)).

Breach of contract. The essential elements of a breach-of-contract claim are: (1) the existence of a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach. *Aguiar v. Segal*, 167 S.W.3d 443, 449 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). A breach occurs when a party fails or refuses to do something it has promised to do. *Townewest Homeowners Ass'n, Inc. v. Warner Commc'n Inc.*, 826 S.W.2d 638, 640 (Tex. App.—Houston [14th Dist.] 1992, no writ). In the Agreement on which General based its breach-of-contract claim, King promised, among other matters, to “hold . . . in strict confidence and not publish or otherwise disclose” certain types of information, including “customer contacts, potential customers . . . [and] prices,” which he “obtained . . . during or as a result of [his] employment” by General, but excepting such information “as is generally available through publication.”

B

Customer contacts. General concedes its list of customers is not confidential. The information at issue is instead the specific contact persons for each customer.

The Agreement applied only to information King “obtained . . . during or as a result of [his] employment” by General. Similarly, in relation to misappropriation of trade secrets, “[t]he general rule is that confidential information *received during the course of fiduciary*

relationships may not be used or disclosed to the detriment of the one from whom the information is obtained.” *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 434 (Tex. App.—Fort Worth 1987, no writ) (emphasis added); *see Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600 (Tex. App.—Amarillo 1995, no writ) (referring to duty—arising apart from any written contract—which forbids an employee from using confidential or proprietary information acquired during the relationship in manner adverse to his employer).

In his affidavit, King attested that, before beginning employment with General, he had worked for SPI for approximately ten years. He listed nine specific customers who he had learned of while working at SPI. He then stated:

Additionally, I became personally acquainted with numerous persons working at many potential insulation customers within the Houston insulation market. As a result of these acquaintances I was aware of employees at each of the [nine previously listed] potential insulation customers . . . that had purchasing authority for such entities before I ever went to work for General Insulation. I was also personally acquainted with persons serving as the customer contacts, with purchasing authority at each of the [nine previously listed] entities . . . as of September 15, 2006. I made these personal acquaintances before I went to work for General Insulation.

General contends King’s affidavit cannot support summary judgment for King because it is the testimony of an interested witness. “A summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.” Tex. R. Civ. P. 166a(c).³ On its face, King’s testimony regarding the source of his knowledge of the customer contacts is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies.

“Could have been readily controverted” does not mean a party could have easily and conveniently rebutted the summary-judgment proof, but rather indicates a party could have

³ General argues the affidavit did not meet the criteria found in Rule 166a(c). General’s argument, however, relates to King’s testimony regarding pricing, not customer contacts.

effectively countered the testimony with opposing evidence. *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997). If King’s representations about the sources of his information were untrue, General could have readily controverted King’s testimony with affidavits or deposition testimony from SPI personnel or from representatives of the nine listed companies. General did not present such evidence.⁴

King’s uncontroverted testimony that he obtained the customer-contact information from sources other than his employment with General supports traditional summary judgment in favor of King on General’s misappropriation-of-trade-secrets and breach-of-contract claims based on the customer-contact information.

Customer-specific pricing. The pricing information at issue is “job pricing,” i.e., the specific pricing information quoted to a specific customer for a specific job. King presented two summary-judgment grounds in relation to this information: (1) he did take any customer-specific pricing information from General; and (2) the customer-specific pricing information was not confidential. To gain reversal of the summary judgment on either cause of action based on the customer-specific pricing information, General must prove each of these grounds is meritless in relation to that cause of action. *See Star-Telegram*, 915 S.W.2d at 473. Because we conclude General has failed to prove the second ground meritless, we need not reach the first.⁵

In relation to General’s misappropriation claim. Apart from any written contract, an employee has a duty to an employer not to use, in a manner adverse to the employer,

⁴ In arguing King’s affidavit cannot support summary judgment in King’s favor, General also quotes a case from the Waco court of appeals for the proposition that “[a] statement of an interested party, testifying as to what he intended, is self-serving, does not meet the standards for summary judgment proof, and will not support a motion for summary judgment.” *Cornelison v. Newberry*, 932 S.W.2d 729, 731 (Tex. App.—Waco 1996, no writ). King’s affidavit testimony about the source of his customer contacts was not a statement about what he intended.

⁵ As in his summary-judgment motion, King, in this court, does not separately argue the import of the alleged lack of confidentiality in relation to each of General’s causes of action and, other than referring to the term “confidentiality” in the Agreement, does not address the language of the Agreement.

confidential or proprietary information acquired during the employment relationship. *See T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 21–22 (Tex. App.—Houston [1st Dist.] 1998, pet. dismiss’d). This duty survives termination of the employment relationship and prevents the former employee’s use of confidential information or trade secrets acquired during the course of his employment. *Id.* at 22. Although, as in *T-N-T Motorsports*, courts refer to “misappropriation of confidential information,” there is no cause of action for misappropriation of confidential information that is not either secret or at least substantially secret. *Stewart & Stevenson Servs., Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 99 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *see SP Midtown, Ltd. v. Urban Storage, L.P.*, No. 14-07-00717-CV, 2008 WL 1991747, at *5 n.5 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.) (stating same and citing *Stewart & Stevenson Servs.*, 879 S.W.2d at 99).

Courts have held pricing information to be a trade secret in some circumstances. *See, e.g., Bertotti v. C.E. Shepherd Co.*, 752 S.W.2d 648, 653–54 (Tex. App.—Houston [14th Dist.] 1988, no writ) (upholding temporary injunction to enforce non-compete covenant because company had legitimate interest in protecting product information, including pricing); *Rugen v. Interactive Bus. Sys., Inc.*, 864 S.W.2d 548, 552 (Tex. App.—Dallas 1993, no writ) (upholding grant of temporary injunction when record contained evidence from which trial court could have determined that information, including pricing information, company sought to protect deserved trade-secret status). As set forth above, courts consider the following factors in determining whether a trade secret exists: (1) the extent to which persons outside the party’s business know the information; (2) the extent to which employees and others within the business know it; (3) the extent of measures the party took to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended to develop the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Lowe’s Cos.*, 134 S.W.3d at 878.

The summary-judgment proof showed the following in relation to the six factors. Even though pricing for an individual customer appeared in the customer’s contract and customers were not required to sign confidentiality agreements, one could infer from Shirey’s testimony that customer-specific pricing was not usually discussed (first and sixth factors). General had, as its only policy, practice, or procedure to protect the information, an “unspoken rule” the customer-specific pricing information was to stay in-house and General required its employees to sign a confidentiality agreement which specifically referred to “price” (third factor). General lost a job to a competitor when its bid was “within pennies” of the competitor’s (fourth factor).

Even viewed in the light most favorable to General, the preceding proof does not rise to the level at which courts have concluded the information at issue was secret.⁶ *See, e.g., Sharma v. Vinmar Intern., Ltd.*, 231 S.W.3d 405, 425–26 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (concluding, when viewed in light most favorable to trial court’s order, the evidence supported each of six factors and trial court’s determination appellee possessed trade secrets because there was: (1) evidence appellee possessed information not known outside its business, including appellee’s sale and purchase histories that provided appellee with trend information about customers’ demands and their suppliers’ product inventory; (2) evidence appellee made concerted effort to maintain secret nature of its information, including controlled access cards to enter appellee’s offices, password protection of computers, confidentiality agreements executed by employees as condition of employment, employee manuals emphasizing confidential nature of appellee’s business, and limitation of access to appellee’s trade-secret information on need-to-know basis to extent appellee’s traders were not allowed to look at each other’s files; (3) evidence appellee possessed trade-secret information impossible for someone outside appellee to properly acquire, including

⁶ Given the different burdens and standards of review applicable to summary-judgment cases, as opposed to cases involving injunctive relief, we acknowledge the difficulty of analogizing the latter to the present summary-judgment case. Nevertheless, we find cases involving injunctive relief instructive for understanding what types of evidence will and will not support the conclusion a trade secret exists. We also refer to cases involving jury verdicts, again recognizing different standards apply to analysis of the evidence.

economics and margins to be realized in Russian isoprene trade; (4) evidence appellee's trade-secret information would be difficult for outsiders to duplicate, including witness's testimony that appellant tried, and failed, to access the isoprene market on his own, and fact competitor had been trying, unsuccessfully, for long period of time to access the Russian isoprene market; (5) evidence appellee expended great amount of time, effort, and money developing and maintaining the isoprene trade-secret information; and (6) evidence of great value of trade secrets to appellee, including evidence Russian isoprene alone earned appellee \$5.5 million profit in first five months of 2005); *T-N-T Motorsports*, 965 S.W.2d at 22–23 (concluding, in temporary injunction case, that specific means of upgrading motor vehicles was trade secret when (1) information was not common knowledge, (2) appellee had obtained information through years of trial and error and spent substantial amount of time and money developing upgrade packages that would fit exact needs of its clientele, (3) component parts used by appellee in its upgrade packages were confidential and many components were not available but had to be built from ground up, and (4) even appellee's customers were not told exact specifications of the work done on their vehicles); *Gonzales v. Zamora*, 791 S.W.2d 258, 265–66 (Tex. App.—Corpus Christi 1990, no writ) (upholding, in trade-secret action against former employees, jury finding that employer's indigent-patient-information-release forms and its authorization forms were trade secrets when (1) former employer spent substantial amount of time and money developing forms and spent time and money having computer program developed to facilitate business procedures, (2) computer program was protected by nondisclosure clause in contract with computer programmer, (3) former employees were asked to sign nondisclosure agreements and were therefore aware of former employer's desire for confidentiality and desire to prevent competitors from using forms and procedures, (4) one of former employer's forms contained clause restricting use of form to only former employer, and (5) forms were provided by former employer for its own employees to use and there was no access to forms except through former employer).

Instead, the summary-judgment proof in the present case more closely approximates evidence in cases in which the information at issue was not considered a trade secret. *See, e.g., Creole Prod. Servs., Inc. v. Harper*, 640 S.W.2d 727, 730 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (holding, in corporation's suit based on allegation former salesman appropriated corporation's trade secrets, jury's failure to find material appropriated by salesman constituted trade secrets was not against great weight and preponderance of the evidence when evidence established the following: (1) there was no writing on documents at issue themselves nor was there a formal written policy indicating documents were considered confidential; (2) some of material could be within common knowledge of trade or general knowledge of industry; (3) some of information was disseminated to customers; (4) some of documents bore logo of another company and several of Creole's forms were very similar to these; and (5) salesman may have had authorized access to many of the documents during his employment); *Numed*, 724 S.W.2d at 435 (holding, on appeal from denial of a temporary injunction, facts did not justify conferring status of trade secret when evidence reflected much of information appellant wished to protect was contained in contracts distributed to appellant's customers, which in turn, anyone might discover, and when employee had not signed a confidentiality agreement).⁷

⁷ General observes *Numed* was a case involving a request for injunctive relief. As noted above, we acknowledge that difference. General also cites *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593 (Tex. App.—Amarillo 1995, no writ). In *Miller Paper*, the court criticized *Numed* as misinterpreting state precedent to the extent it refused to protect business data compiled by an employer but subject to discovery through independent investigation. *Id.* at 601 n.3. In *Dannenbaum v. Brummerhop*, this court considered a jury instruction that tracked the *Numed* approach. 840 S.W.2d 624, 631–33 (Tex. App.—Houston [14th Dist.] 1992, writ denied). The *Dannenbaum* court referred to two lines of Texas cases—one in which courts analyze the difficulty in obtaining customer lists to determine whether such lists are confidential information (the *Numed* line) and the other in which courts focus on the method actually used to obtain the information (the line of cases on which *Miller Paper* subsequently relied to criticize *Numed*). *Id.* at 632–33. The *Dannenbaum* court observed: “The instruction in this case essentially stated that information one could readily obtain in the general industry could not be appropriated as confidential. Although Texas case law is conflicting, there is authority supporting the statement included in this instruction.” *Id.* at 633. The court then concluded it could not say the trial court submitted an improper instruction. *Id.*

In short, the summary-judgment proof established the customer-specific pricing information did not rise to the level of a trade secret.

In relation to General’s breach-of-contract claim. When we construe a contract or agreement, our primary goal is to ascertain and give effect to the parties’ intent as expressed in the contract. See *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). We give contract terms their plain, ordinary, and generally accepted meanings unless the contract itself shows the terms are used in a technical or different sense. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

The Agreement required an employee to hold “in strict confidence” information about “practices,” “methodologies,” “costs (including manufacturing costs),” and “prices.” The Agreement did not require an employee to keep confidential information “such as is generally available through publication.”

In interpreting this provision, we are guided by our previous decision in *Allan J. Richardson & Associates, Inc. v. Andrews*, 718 S.W.2d 833 (Tex. App.—Houston [14th Dist.] 1986, no writ). In that case, a former employer argued the trial court erred by refusing to enjoin former employees from disclosing confidential information. *Id.* at 836. The employment contract, which was the basis of the requested injunction, required an employee, during his employment and for two years after, not to “disclose to any third person or party or use for his own benefit any trade secret or confidential information.” *Id.* The former employer attempted to distinguish prior cases denying trade secret status to the type of information in question. *Id.* at 837. The employer argued these cases were distinguishable because they applied a common law theory of unfair competition rather than a contractual prohibition on disclosure. *Id.* This court rejected the argument and observed, “Even in the vernacular the word secret implies that the information is not generally known or readily available.” *Id.*

The Agreement in the present case, by its own terms, did not apply to information that was “generally available through publication.” In light of *Allan J. Richardson*, we conclude the Agreement was not intended to apply to information that was not a trade secret. As discussed above, the summary-judgment proof established the customer-specific pricing information was not a trade secret. Thus, its disclosure or use, if any, could not constitute a breach of the Agreement.

* * *

For the preceding reasons, overrule General’s sole issue and affirm the summary judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Seymore, Brown, and Sullivan.