

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

DICKINSON EQUIPMENT COMPANY, )	No. 67650-4-I
LLC, )	
Appellant, )	DIVISION ONE
)	
v. )	
)	UNPUBLISHED OPINION
NORTHWEST PUMP & EQUIPMENT )	
CO., DONALD MAYFIELD aka DAVE )	
MAYFIELD, and MARK )	
STEINBERGER, )	
)	
Respondents. )	FILED: <u>December 10, 2012</u>

Spearman, A.C.J. — Dickinson Equipment Company, a seller of industrial air compressors, sued its competitor, Northwest Pump & Equipment, as well as two former employees, Donald Mayfield and Mark Steinberger, for misappropriation of trade secrets and breach of non-compete and non-disclosure provisions in Mayfield and Steinberger’s employment agreements. The trial court dismissed the case on summary judgment.

We affirm dismissal of the trade secret misappropriation claims and the breach of contract claim against Steinberger. Regarding the breach of contract claim against Mayfield, however, questions of fact preclude summary judgment, and we reverse dismissal of that claim. Affirmed in part, reversed in part, and remanded.

FACTS

Dickinson Equipment Company, Inc. (the predecessor entity to appellant Dickinson Equipment Co., LLC) was the Pacific Northwest distributor of Sullair air compressor and equipment parts. Donald Mayfield sold compressed air equipment, including the Sullair air compressor line, for Dickinson. Mayfield was eventually promoted to the position of sales and marketing manager for Dickinson. In May 2001, Dickinson hired Mark Steinberger as an outside sales representative. In 2006, both Mayfield and Steinberger signed employment agreements that included non-compete and non-disclosure provisions.

The non-disclosure agreements precluded Mayfield and Steinberger from disclosing any information relating to Dickinson's business:

CONFIDENTIALITY. Employee recognizes that Dickinson has and will have information regarding the equipment, software, systems, products, prices, costs, discounts, future plans, business affairs, processes, trade secrets, technical matters, customer lists, product design, technical know-how, and other vital information (collectively, "Information") which are valuable, special and unique assets of Dickinson. Employee agrees that the Employee will not, at any time or in any manner, directly or indirectly, divulge, disclose, or communicate in any manner any Information to any third party without the prior written consent of [] Dickinson. Employee will protect the information and treat it as strictly confidential. A violation by Employee of this paragraph shall be a material violation of this Agreement and will justify legal and/or equitable relief.

Clerk's Papers (CP) at 69.

The non-competition agreements precluded Mayfield's and Steinberger's employment with any company engaged in sales or service of air compressors in the states of Washington, Oregon, Idaho, and Montana for one year following termination

of employment:

NON-COMPETE AGREEMENT. Recognizing that the various items of Information are special and unique assets of the company, Employee agrees and covenants that for the term of this agreement and for a period of one year following the voluntary termination of Employee or the involuntary termination for cause, Employee will not directly or indirectly engage in any business competitive with Dickinson. Directly or indirectly engaging in any competitive business includes, but is not limited to, (i) engaging in a business as owner, partner, or agent, (ii) becoming an employee of any third party that is engaged in such business, (iii) becoming interested directly or indirectly in any such business, or (iv) soliciting any customer of Dickinson for the benefit of a third party that is engaged in sales or service of air compressors in the states of Washington, Oregon, Idaho, and Montana.

CP at 69.

Respondents contend that Dickinson began experiencing financial difficulties.

According to respondents, Dickinson fell behind in payments to Sullair, its main supplier of air compressors, and by 2009, Sullair's customers were not receiving support from Dickinson for Sullair's products. Thus, respondents contend Sullair began to move its business to another distributor, Northwest Pump & Equipment Co. (Northwest Pump). Dickinson vigorously disputes these allegations. In December 2009, Sullair signed a distribution agreement with Northwest Pump, and in March 2010, Sullair canceled its distribution agreement with Dickinson.

In November 2009, Mayfield applied for employment at Northwest Pump. Northwest Pump hired Mayfield "to work in NW Pump's petroleum pump department and to assist in setting up an air compressor department." Brief of Respondent (Br. Resp.) at 8. When Mayfield resigned from Dickinson in November 2009, Steinberger replaced Mayfield as Dickinson's sales manager. On January 22, 2010, however,

Steinberger notified Dickinson that he had accepted an air compressor sales position with North West Pump.

Dickinson sued Northwest Pump, Mayfield, and Steinberger on February 22, 2010, alleging trade secrets misappropriation, breach of contract, and violations of the Consumer Protection Act. Dickinson obtained an ex parte restraining order the next day. The temporary restraining order enjoined Mayfield and Steinberger from working at Northwest Pump. The temporary restraining order also directed Northwest Pump to produce within seven days all emails regarding Northwest Pump's contact with Dickinson customers and all emails regarding Northwest Pump's use of Mayfield and Steinberger to develop its air compressor business. Northwest Pump, Mayfield, and Steinberger objected to the breadth and expedited timing of discovery, and the court commissioner stayed the order pending a preliminary injunction hearing.

After the hearing, the trial court entered a preliminary injunction. The trial court agreed that many of Northwest Pump's objections were valid, finding that the non-competition provisions of the employment agreements were overly broad in purporting to prohibit any employment of Mayfield and Steinberger in the compressor business. The trial court ordered that Sullair's current and potential customers could contact Northwest Pump, but that Northwest Pump, Mayfield, and Steinberger were enjoined from disclosing or using any of Dickinson confidential or trade secret information, and were enjoined from soliciting Dickinson customers. Additionally, the trial court declined to grant expedited discovery.

The respondents moved for summary judgment, arguing Dickinson had no evidence they had misappropriated any trade secrets, no evidence Steinberger or Mayfield breached their employment, and no evidence that could support a CPA claim. Dickinson apparently served its response pleadings on time to the moving parties, but did not file the response pleadings with the trial court until the day the reply brief was due. After oral argument on the summary judgment hearing, Dickinson filed a supplemental memorandum, which the trial court declined to consider. Additionally, the day after oral argument, Dickinson filed a motion seeking to compel “the Production of Documents & Things” and asking that summary judgment dismissal be “stayed or refused at this time, consistent with CR 56(f).” CP at 541-42. The trial court denied that motion, and granted the summary judgment motion, dismissing all claims. Dickinson moved for reconsideration. The motion for reconsideration included two additional declarations from Dickinson’s principles, Ed and Chris Tudor. The trial court denied the motion for reconsideration. Dickinson appeals dismissal of the trade secret misappropriation claims, and the breach of contract claims against Mayfield and Steinberger.

#### DISCUSSION

Motion to Compel or for Continuance under CR 56(f). Dickinson argues the trial court abused its discretion by denying its motion to compel or, alternatively, for a continuance under CR 56(f). We reject this argument. A trial court’s denial of a motion to compel or a CR 56(f) motion for a continuance is reviewed for an abuse of discretion.

See Clarke v. Office of the Attorney General, 133 Wn. App. 767, 777, 138 P.3d 144 (2006); Mossman v. Rowley, 154 Wn. App. 735, 742, 229 P.3d 812 (2009). “A court abuses its discretion when it bases its decision on unreasonable or untenable grounds.” Clarke, 133 Wn. App. at 777 (quoting Brand v. Dep’t of Labor & Indus., 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)).

Additionally, a trial court has the discretion to deny a continuance if “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” Janda v. Brier Realty, 97 Wn. App. 45, 54, 984 P.2d 412 (1999) (quoting Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)).

Here, Dickinson delayed moving to compel or seeking a continuance until after oral argument on the summary judgment motion. The response to summary judgment sought no continuance, and although Dickinson alleged that Northwest Pump destroyed some emails in its summary judgment response, it did not move to compel or seek any other relief on the issue. Instead, the day after oral argument on summary judgment, Dickinson filed a two page “motion to shorten time to hear the motion to compel the production of documents & things” and asking that summary judgment dismissal be “stayed or refused at this time, consistent with CR 56(f).” CP at 541-42. The motion gives no reason for the delay, nor does it state what would be established through the additional discovery or whether any discovered material would raise a

genuine issue of material fact. Under these circumstances, the trial court did not abuse its discretion in denying the motion.

Trade Secret Misappropriation claims. Dickinson argues it presented evidence in response to summary judgment that all three defendants misappropriated its trade secrets. We disagree.

In general, the moving party on summary judgment bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A moving defendant may meet the initial burden by “‘showing’—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party’s case.” Young, 112 Wn.2d at 225 n.1, (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986)). Where a plaintiff’s response to the motion “‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’” the trial court should grant the motion. Id. at 225 (quoting Celotex Corp., 477 U.S. at 322. This court reviews summary judgments de novo. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

The Washington Uniform Trade Secrets Act defines a trade secret as:

information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable

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by proper means by, other 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.

RCW 19.108.010(4). Dickinson had the burden of proving a trade secret exists.

Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 749, 958

P.2d 260 (1998); Precision Moulding & Frame, Inc. v. Simpson Door Co., 77 Wn. App.

20, 25, 888 P.2d 1239 (1995).

To demonstrate a trade secret, a plaintiff must show: (1) that the information derives independent economic value from not being generally known or readily ascertainable to others who can obtain economic value from knowledge of its use, and (2) that reasonable efforts have been taken to maintain the secrecy of the information.

Precision Moulding & Frame, 77 Wn. App. at 25. Information already in the public

domain or readily ascertainable by proper means by someone who can derive

economic benefit from it, regardless of its application, is not novel and derives no

independent economic value from not being known. Precision Moulding, 77 Wn. App.

at 26-27. A plaintiff must describe the alleged unique, innovative, or novel information

with specificity, and “conclusory” declarations that fail to “provide concrete examples”

are insufficient to support a trade secret claim. McCallum v. Allstate Property and Cas.

Ins. Co., 149 Wn. App. 412, 425-26, 204 P.3d 944 (2009).

Customer lists, as well as other information associated with those lists, can be considered trade secrets under the Act. Whether such a list is protected as a trade secret depends on three factual inquiries: (1) whether the list is a compilation of



information; (2) whether it is valuable because unknown to others; and (3) whether the owner has made reasonable attempts to keep the information secret. Ed Nowogroski Ins. Inc. v. Rucker, 137 Wn.2d 427, 442, 971 P.2d 936 (1999).

Respondents argue that Dickinson failed to show its customer list is a trade secret. Dickinson contends the respondents did not raise this issue below and are precluded from doing so on appeal. We reject this argument because it ignores the procedural history below.

In their summary judgment motion, the defendants put Dickinson to its proof, arguing Dickinson had no evidence they had misappropriated any trade secrets. Dickinson's summary judgment response, which was not filed with the trial court until the same day the reply brief was due, was so devoid of content it is not an understatement to say Dickinson essentially gave no response to the summary judgment motion. The response is six pages long, and does not discuss, cite to, or provide any analysis of the Washington Trade Secrets Act, its elements, or a single case analyzing the Act.

Additionally, although Dickinson included three declarations in support of the summary judgment response, Dickinson did not cite to them at all. The declarations were simply appended to the back of the summary judgment response memorandum, along with nearly two hundred pages of documents, including spreadsheets, email threads, and an entire deposition transcript. The sole reference to the declarations in the summary judgment response reads: "As the Court will see, when it reviews the

detailed declarations of Ed Tudor and Chris Tudor, principals in Dickinson, the evidence in support of their claims is stronger now that [sic] it was on March 12, 2010.” CP at 348.

Thus, it is not particularly surprising that the respondents’ reply brief below did not focus specifically on the question of whether Dickinson’s customer list qualified as a trade secret. Nonetheless, it is evident that from the transcript of the summary judgment hearing that the issue was placed before the trial court because the judge spent a substantial amount of time attempting, unsuccessfully, to elicit from Dickinson the specific information it claimed to constitute the misappropriated trade secrets. Thus, Dickinson’s argument that respondents are precluded from raising the issue of whether Dickinson’s customer lists and associated information were trade secrets is not well taken.

We also conclude that the trial court did not err in granting summary judgment. As an initial matter, we note that the trial court had no obligation to comb through Dickinson’s filings below to discover on its own evidence that would allow Dickinson to avoid summary judgment.

To identify issues without analysis of the underlying legal theory giving rise to the issues means that an adversary expects the court to research all possible theories of legal liability and apply them to hypothetical facts. It is not the function of trial or appellate courts to do counsel’s thinking and briefing.

Orwick v. City of Seattle, 103 Wn.2d 249, 256, 692 P.2d 793 (1984). But even upon review, the declarations shed little light on the specific nature of the alleged trade secret violations. The declarations relied in large part on conclusory allegations

unsupported by reference to anything in the record.<sup>1</sup> In contrast, the customer lists considered in Ed Nowogroski, a case upon which Dickinson relies, included “customer names, expiration dates, coverage information and related information” such that they were a compilation of unique, unascertainable information. Ed Nowogroski, 137 Wn.2d at 442. Here, Dickinson claims that respondents used its customer names but concedes the names of its customers were also known by Sullair. Thus, the customer names were readily ascertainable to others and not in and of themselves confidential information. Dickinson failed to specify in its response below what, if anything, other than customers names, was misappropriated by the respondents.

In sum, Dickinson failed to make a showing to the trial court that its customer lists were trade secrets. Respondents were therefore entitled to summary judgment. Young, 112 Wn.2d at 225; Celotex, 477 U.S. at 322.

Breach of contract claim against Steinberger. Dickinson argues it presented evidence in response to the summary judgment motion that Steinberger breached the non-compete and non-disclosure portions of his employment agreement. We disagree.

As was the case with the trade secret misappropriation issue, the summary judgment response brief says nothing about Dickinson’s breach of contract claims. It does not discuss, cite to, or provide any analysis of the terms of Steinberger’s employment contract. Additionally, the response did not cite to, discuss, or quote from

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<sup>1</sup> For example, the declaration of Ed Tudor baldly asserts, “NW Pump’s documents show that Northwest is still taking advantage of Dickinson confidential information.” CP at 397. But does not specify what the confidential information is or how respondents are taking advantage of it or explain where in the record information supporting this claim can be found.

any of the three declarations Dickinson filed in support of the summary judgment response. Thus, after defendants argued Dickinson had no evidence demonstrating Steinberger breached the non-compete and non-disclosure portions of his employment agreement, Dickinson failed to respond. The trial court did not err in granting summary judgment on this claim when it had no response argument before it.

Likewise, on appeal, Dickinson still does not identify how Steinberger breached the non-compete and non-disclosure portions of his employment agreement. On this issue, the argument section of the Opening Brief does not describe or mention a single act by Steinberger showing he violated the non-compete or non-disclosure portions of his contract. See Opening Brief at 24-28. Instead, there is a single, conclusory sentence:

In this case, the trial court did not explain why it concluded as a matter of law that Mayfield and Steinberger did not breach the terms of their employment agreements, particularly where there was clear evidence they competed with Dickinson after their departure and communicated confidential information to Northwest Pump to enable it to take Dickinson's business.

Opening Brief at 28.

Only in the facts section of the opening brief does Dickinson allege any facts potentially indicating Steinberger violated his employment contract:

Steinberger *admitted* to servicing Metagenics. CP 336. See also, CP 724-25, 729-32. He further admitted to visiting Dickinson customers with former Dickinson service personnel now employed by Northwest Pump. CP 374.

Opening Brief at 15-16. The problem with these allegations, however, is that the actions complained of are not violations of the employment agreement. While the

agreement precluded Steinberger and Mayfield from soliciting former Dickinson customers, it did prohibit all contact with former Dickinson customers:

IT IS HEREBY ORDERED that the non-compete provisions of the Agreement in question would bar the Defendants Donald Mayfield and Mark Steinberger from soliciting former Dickinson customers for a period of one (1) year after their termination of the employment with Dickinson, which has now passed. As a result Defendants Mayfield and Steinberger may, at this time, compete and solicit former Dickinson customers.

CP at 267 (Order to Clarify Preliminary Injunction, dated April 26, 2011).

Indeed, an examination of the citations to the record given by Dickinson in its Opening Brief shows Steinberger did not solicit any customers. The first citation is to his declaration, which states that he did not solicit former Dickinson customer Metagenics, but instead it was Metagenics who contacted him:

1. I did not solicit or contact Mark Seabring or anyone else at Metagenics to sell air compressor parts or service in 2010.
2. In the first half of 2010, someone at Metagenics called Northwest Pump requesting information and pricing on a Sullair air compressor asking where they could obtain Sullair parts. That person was referred to me. Metagenics performs its own compressor maintenance. Months later, Mark Seabring requested a quote on information he provided to Northwest Pump and I did send a quote in response per Metagenics request.

CP at 336.

Likewise, the citation to Steinberger's deposition testimony shows he responded to a customer, not that he solicited the customer:

Q: . . . And what was the purpose of you going to a Dickinson Equipment customer with service tech Tom Stabb of Northwest Pump in February 2010?

A: The customer had requested to speak with a representative of Northwest Pump.

CP at 374.

The final citation on this issue is not to any additional evidence in the record, but is instead to a supplemental declaration of Dickinson principal Ed Tudor, filed along with Dickinson's motion for reconsideration. Generally speaking, a second declaration from one of the parties is not newly discovered evidence permissible to support a motion for reconsideration. See Wagner Development, Inc. v. Fidelity & Deposit Co. of Maryland, 95 Wn. App. 896, 907, 977 P.2d 639 (1999) (affirming denial of reconsideration where additional evidence "was available when the parties filed their motions for summary judgment"). But even if we considered this declaration, it simply repeats the above-described allegation that Steinberger's contact with Metagenics violated his employment agreement.

Thus, even putting aside the deficiencies in the briefing to the trial court below, we can discern no evidence in the record that Steinberger violated his employment agreement. The trial court did not err in granting summary judgment on this claim.

Breach of contract claim against Mayfield. Dickinson argues it presented evidence in response to summary judgment that Mayfield breached the non-compete and non-disclosure portions of his employment agreement. As was the case with Steinberger, the summary judgment response did not discuss, cite to, or provide any analysis of the terms of Mayfield's employment contract. Nor did it cite to, discuss, or quote from any of the three declarations Dickinson filed in support of the summary judgment response. Thus, after defendants argued Dickinson had no evidence

demonstrating Mayfield breached the non-compete and non-disclosure portions of his employment agreement, Dickinson failed to adequately respond.

Nevertheless, at least one email attached to one of the declarations submitted along with the response brief shows Mayfield did, in fact, solicit a Dickinson customer. Specifically, the email shows Mayfield contacted James Tittle, a representative of Les Schwab,<sup>2</sup> on March 25, 2010, when the prohibition on soliciting customers was still in place. The subject of the email was “Account Setup” and when viewed in a light most favorable to Dickinson, it shows Mayfield soliciting Tittle’s business:

James,

Just an FYI, we have you all set up and can begin filling your orders should you have any parts needs. The service team will be in training all next week, but after that, we will be ready to handle any emergency service needs that arise.

I would like to know if you and Mike would discuss an internal memo to let the stores know that they can call us for service. I know that you cannot push them our way, but would it be possible to at least let them know that we are an option and the only authorized Sullair parts and service dealer for the NW?

Thanks,

Dave Mayfield

CP at 419.

Mayfield argues the non-compete provisions of his employment contract are unenforceable as unlawful restraints on trade. Mayfield primarily takes issue with the breadth of the provision that precluded any employment in a four state area with any company engaged in the sale or service of air compressors. But Mayfield made this same argument to the trial court at the preliminary injunction hearing, and the trial court

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<sup>2</sup> The parties do not appear to dispute this was a Dickinson customer.

agreed with Mayfield. As such, the non-compete provision of his employment agreement did not actually preclude his employment at Northwest Pump; rather, it restricted his ability to solicit Dickinson clients for one year. We reject Mayfield's argument on this issue.

In short, the record contains a question of fact precluding summary judgment as to Dickinson's breach of contract claim against Mayfield. We therefore reverse summary judgment on Dickinson's breach of contract claim against Mayfield.

Attorney Fees. Dickinson argues it is entitled to attorney fees on appeal under the trade secrets act which provides:

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

RCW 19.108.040. We reject the request in light of our resolution of Dickinson's trade secret misappropriation claims.

Affirmed in part, reversed in part, and remanded.

Speckman, A.C.W.

WE CONCUR:

Becker, J.

Grosse, J.