IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAUL M. WOLFF CO., a foreign corporation, Appellant, v. KEITH MILLER, an individual, and FINAL CONCRETE, LLC, a Washington limited liability company, Respondents.	No. 41261-6-II UNPUBLISHED OPINION

Armstrong, P.J. — Paul M. Wolff Company (Wolff) appeals a summary judgment in favor of Keith Miller, a former employee whom Wolff sued for breach of his duty of loyalty. Miller and Wolff had entered into an employee agreement (Agreement), which included a provision that California law would govern disputes arising from the Agreement. While still employed by Wolff, Miller formed Final Concrete, LLC to perform concrete work. The trial court ruled that under California law, Miller owed no fiduciary duty to Wolff because he was not in a management position with significant authority.

Wolff argues that the trial court should have applied Washington law, not California law. In its briefing, Wolff argued that Washington law was more favorable to Wolff than California law. But at oral argument, Wolff conceded that the result would likely be the same under California law or Washington law. Accordingly, we hold that the trial court did not err in applying California law; nor did it err in ruling that Wolff's claim for breach of duty fails. We affirm.

FACTS

Wolff sued Miller and Final Concrete, LLC for unlawful competition, tortious interference with a contract, misappropriation of proprietary information, and breach of a fiduciary duty. On appeal, Wolff pursues only its claim that Miller breached a fiduciary duty of loyalty.

In June 2004, Miller signed an agreement and started working for Wolff as a management level trainee. Wolff was a California corporation in 2004; it is now a Utah corporation. Miller is a Washington resident and was throughout the time period at issue.

The Agreement provides, in relevant part:

> [T]hat the law of California shall govern the respective rights and obligations of parties in this employee agreement. If any provision of this employee agreement shall be voided by reason of a statute of law, as properly and judiciously applied to this employment agreement then this employee agreement shall be construed as if such provision is not contained herein and so far as such particular judication [sic] is concerned.

Clerks Papers (CP) at 11.

During his employment, Miller was a salesman, earning commissions but not a regular salary. He evaluated potential jobs and submitted bids for concrete coating applications on Wolff's behalf. Wolff worked on commercial projects but not residential projects. Wolff also did not apply for joint filler projects.

Before he started with Wolff, Miller had no formal experience in concrete refinishing, sealing, purchasing concrete floor material and products, or bidding for concrete sealing jobs. Miller formed Final Concrete, LLC in September 2008, while still employed by Wolff. Miller is the sole employee of Final Concrete. He formed Final Concrete to perform residential concrete coating and joint filler work without informing Wolff. Miller, on behalf of Final Concrete,

submitted 10 to 12 bids for "little joint filler[]" projects before he resigned from Wolff in January 2009. CP at 57. Wolff did not bid on any of these projects. Neither Miller nor Final Concrete entered into any contracts, received payment, ordered materials, or applied materials while Miller was still employed by Wolff.

The trial court applied California law as specified in the parties' contract and granted Miller's motion for summary judgment. Applying California law, the trial judge concluded that because Miller had only minor involvement in management at Wolff, he was not liable for breaching a fiduciary duty based on competition with his employer. Moreover, Wolff presented no evidence that Miller took away customers or violated any duties owed to Wolff.

ANALYSIS

I. Standard of Review

We review a summary judgment de novo. *Amalgamated Transit Union Local No. 587 v. State*, 142 Wn.2d 183, 206, 11 P.3d 762 (2000). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Amalgamated Transit*, 142 Wn.2d at 206; CR 56(c).

To avoid summary judgment, the plaintiff must make out a prima facie case concerning the essential elements of his or her claim. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795 (2009). And if the plaintiff fails to make a sufficient showing of the essential elements, then the trial court should grant the motion for summary judgment because "'a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)

(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

II. Choice of Law Provision

The Agreement includes a choice of law provision in which the parties agreed that California law should govern the parties' rights and obligations. Wolff originally argued in its briefing that the trial court erred in applying California law, reasoning that such application denied it due process, that the parties now have no connection to California, and that the Agreement addresses a fiduciary duty of loyalty that Miller allegedly violated here.

Choice of law is a question of law that we review de novo. *Erwin v. Cotter Health Ctrs. Inc.*, 161 Wn.2d 676, 691, 167 P.3d 1112 (2007). When parties dispute the effectiveness of a choice of law provision, we will engage in a conflicts analysis only if the disputing party can demonstrate an actual conflict between the law or interests of the two states. *Erwin*, 161 Wn.2d at 692. An actual conflict exists where the various states' laws could produce different outcomes on the same legal issue. In its briefing, Wolff cited no Washington or California cases or statutes that demonstrate an actual conflict, such that the result here would likely be different depending on which state law we apply. And Wolff conceded at oral argument that the result would likely be the same in either state. Accordingly, we do not address Wolff's conflicts argument.

III. Fiduciary Duty

Wolff argues that genuine issues of material fact exist as to whether Miller breached a fiduciary duty under California law. Miller responds that Wolff lacks sufficient evidence to substantiate its claim that he breached his fiduciary duty.

Fiduciary duties are imposed by law in certain technical, legal relationships such as those between partners or joint venturers, guardians and wards, trustees and beneficiaries, *principals and agents*, and attorneys and clients. *GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc.*, 83 Cal. App. 4th 409, 416, 99 Cal. Rptr. 2d 665 (2000), *overruled on other grounds by Reeves v. Hanlon*, 33 Cal. 4th 1140, 17 Cal. Rptr. 3d 289 (2004). "[A]n employer has the right to expect the undivided loyalty of its employees. The duty of loyalty is breached, and may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interests of the employer." *Stokes v. Dole Nut Co.*, 41 Cal. App. 4th 285, 295, 48 Cal. Rptr. 2d 673 (1995).

To prove a prima facie case that Miller breached his fiduciary duty of loyalty, Wolff must show that a relationship existed giving rise to a duty of loyalty, Miller breached that duty, and Wolff suffered damages as a result *See Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 410, 58 Cal. Rptr. 3d 527 (2007).

A. Duty

Under California law, an employee's duty of loyalty does not preclude him from conducting "a business enterprise independent from, though similar to, that conducted by" his employer, so long as the employee acts in good faith and does not seize business opportunities in the company's line of activities in which the company has an interest and prior claim. *Indus. Indem. Co. v. Golden State Co.*, 117 Cal. App. 2d 519, 533, 256 P.2d 677 (1953). In an employment relationship, to determine whether a fiduciary duty is owed, courts look to whether the employee participates in management of the corporation and exercises discretionary authority.

GAB Bus. Servs., Inc., 83 Cal. App. 4th at 420-21 (noting corporate officers ordinarily have the direct managerial responsibility for the actual conduct of corporate affairs). But under California law, a merely "nominal" officer with no management authority is not a fiduciary. *GAB Bus. Servs., Inc.*, 83 Cal. App. 4th at 420-41.

Wolff appears to argue that Miller exercised executive duties because he had "great freedom to cultivate relationships with potential clients on behalf of [Wolff], and had little supervision in doing so." Br. of Appellant at 15. But Wolff cites no authority that Miller's activities as a salesman rose to the level of exercising management authority such that he owed a fiduciary duty.

B. Breach

Wolff claims that Miller was engaged in the "same type of work" for Final Concrete that he was employed to do for Wolff in the field of concrete surface sealing. RP at 14. Further, Wolff argues that Miller's Final Concrete business operated in a way contrary to his employer's best interests. But Wolff offered no evidence in support of these claims. For example, Wolff produced no evidence that Miller bid on jobs for Final Concrete that he should have bid on for Wolff. Nor has Wolff offered any evidence that any of Miller's activities on behalf of Final Concrete affected Wolff in any way. On summary judgment, Wolff offered only its chief executive officer's (CEO) deposition testimony to support its claim that Miller breached a duty. Specifically, Curtis Beesley, Wolff's CEO stated, "When you're being employed--when you're employed by one company, being paid by one company, and then starting another business, whether it's your competition or not, I find that to be a violation of fiduciary responsibility of any

employee." CP at 27.

Wolff relies on *Fowler v. Varian Associates, Inc*., 196 Cal. App. 3d 34, 241 Cal. Rptr. 539 (1987), for the proposition that an "employee may not transfer his loyalty to a competitor." Br. of Appellant at 15. Varian employed Fowler as its marketing manager. *Fowler*, 196 Cal. App. 3d at 37. While still employed by Varian, Fowler helped establish Omega for the purpose of selling a product that he admitted would be "a reasonable or viable alternative" to Varian's products and competitive with Varian. *Fowler*, 196 Cal. App. 3d at 38. Fowler's work for Omega included attending meetings, providing suggestions to a co-owner, and assisting Omega in obtaining financing by associating himself with the business. *Fowler*, 196 Cal. App. 3d at 38. The court stated that "California law . . . permit[s] an employee to seek other employment and even to make some 'preparations to compete' before resigning . . ." but held that an employee may not transfer his loyalty to a competitor. *Fowler*, 196 Cal. App. 3d at 41. The court concluded that Varian had good cause to terminate Fowler. *Fowler*, 196 Cal. App. 3d at 42.

The facts here are distinguishable from *Fowler*. While Miller, in his deposition, stated that Wolff does "coatings and commercial stuff, where as we can do commercial and residential," this evidence alone does not establish a breach. CP at 38. The record demonstrates that Wolff bid on only commercial concrete jobs while Final Concrete bid on only residential concrete jobs and joint filler projects. Miller did not sign a contract before terminating his employment with Wolff. Miller submitted no bid on behalf of Final Concrete for any project in which Wolff submitted a bid. Wolff also does not allege that Miller used confidential information to solicit Wolff's customers. Thus, Wolff offered no evidence that Miller breached his fiduciary duty of loyalty by

engaging in direct competition with the company.

We affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.