

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

UNIMAK AMERICA LLC, a Washington
limited liability company, derivatively by and
through member, BORIS A. NADEIN,

Appellant/
Cross-Respondent,

v.

WILLIAM TURNER and JANE DOE
TURNER, husband and wife, and the marital
community comprised thereof; and UNIMAK
MARITIME GROUP LLC, a Washington
limited liability company,

Respondents/
Cross-Appellant,

ANZHELDA DORSEY and JOHN DOE
DORSEY, and the marital community
comprised thereof,

Defendants.

No. 38354-3-II

UNPUBLISHED OPINION

Bridgewater, P.J. — Because genuine issues of material fact existed and Unimak Maritime Group, LLC (UMG) was not entitled to judgment as a matter of law, we vacate the trial court’s summary judgment order and remand for a new trial. In addition, we vacate the trial court’s order on plaintiff’s motion to compel. Because we remand for a new trial, we do not reach Boris

Nadein's remaining issues.

FACTS

Boris Nadein and William Turner formed Unimak America, LLC (UA) on May 30, 1997. UA had contracts with two companies, SakhalinRybakSoyuz¹ and Rassvet, each owned by Evgeny Yarygin. Turner unilaterally and wrongly dissolved UA on April 13 or 15, 2005, in violation of chapter 25.15 RCW. On April 18, 2005, Turner formed UMG without Nadein. That same day, UMG entered into contracts with SakhalinRybakSoyuz and Rassvet. On September 29, 2005, Nadein sued Turner and UMG for, among other things, conversion of UA assets, including UA's goodwill and for breach of fiduciary duties to Nadein and UA. Nadein alleged in part that Turner canceled UA's business contracts, that Turner and UMG took possession of UA's office lease and tangible assets such as office equipment, and that UMG entered into new contracts with UA's former clients.

Nadein moved to compel production of UMG's financial information, including income and expenses UMG realized from its businesses with SakhalinRybakSoyuz and Rassvet. The trial court denied Nadein's motion to compel in part and ordered UMG to provide "the following concerning its clients in common with Unimak America: any agreements, the volume of business, all communications between UMG and those clients related to the changeover from UA and UMG." CP at 94.

UMG moved for summary judgment, and argued that it should be dismissed from the suit because it did not have any liability as a successor and no exception to that rule applied. The trial

¹ In the record before us this company's name is inconsistently capitalized. We use SakhalinRybakSoyuz throughout this opinion.

court found UMG entitled to summary judgment as a matter of law and dismissed all claims against UMG. The trial court did not find that Nadein could not prove any of the elements of his claims. The proposed order included a statement that there was a lack of evidence of goodwill and a lack of evidence that UMG failed to pay goodwill, but the trial court crossed that language out. Neither party offered independent valuation evidence in support of their summary judgment briefs and instead relied on their own declarations.

At trial, Nadein offered testimony from Kell Rabern, a certified public accountant, regarding UA's asset values, including goodwill that Turner transferred to UMG. Rabern used a multiplier of UA's past income to value the goodwill at about \$836,277. Rabern did not review all financial documents produced during discovery though.

Turner moved to strike Rabern's testimony about the value of UA's goodwill, and argued that Rabern was not qualified to give that testimony. At the close of Nadein's case, Turner moved for a directed verdict,² and argued that Nadein had failed to prove, among other things, that Turner's alleged conversion of UA goodwill caused any damage. Turner argued that Rabern was not sufficiently familiar with the industry and that Rabern failed to take into account certain evidence. The trial court found Rabern not credible and struck his testimony. Without Rabern's testimony, Nadein had no evidence about the value of UA's goodwill and, therefore, could not establish damages. The trial court granted Turner's directed verdict motion. Nadein appeals.

² Because this was a bench trial, the trial court should have considered Turner's motion for directed verdict as one for involuntary dismissal under CR 41(b)(3). *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006).

ANALYSIS

I. Summary Judgment

When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). If the moving party is a defendant and meets this initial showing, the inquiry shifts to the plaintiff. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial, then the trial court should grant the defendant's summary judgment motion. *Young*, 112 Wn.2d at 225. We consider all reasonable inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

Conversion is the unjustified, willful interference with a chattel that deprives a person entitled to the property of possession. *Lang v. Hougan*, 136 Wn. App. 708, 718, 150 P.3d 622 (2007), *review denied*, 163 Wn.2d 1018 (2008). Goodwill is a convertible asset. *Lang*, 136 Wn. App. at 719.

Nadein argues that the trial court erred by granting UMG's summary judgment motion because UMG converted UA's goodwill by soliciting UA's customers without paying consideration.³ We agree.

A. Successor Liability Rule

Nadein correctly argues that the successor liability rule does not apply. The successor liability rule determines when a party may sue a corporation that has purchased the assets of a defunct or insolvent company for the debts or liabilities of the defunct or insolvent company. *Gall Landau Young Constr. Co. v. Hedreen*, 63 Wn. App. 91, 96, 816 P.2d 762 (1991), *review denied*, 118 Wn.2d 1022 (1992). Nadein did not claim that UA owed him a debt or seek to hold UMG liable for that debt. Instead, he argued that UMG is directly liable for conversion because it accepted assets from Turner, knowing that he converted them without paying compensation. Successor liability does not apply under these circumstances and that doctrine does not entitle UMG to judgment as a matter of law.

B. Genuine Issues of Material Fact

In addition, genuine issues of material fact exist. UMG claimed that UA received appropriate compensation for its goodwill, while Nadein claimed that UA received no compensation for its goodwill. The parties also disputed whether UMG converted a UA business asset. UMG argued that Nadein's actions caused SakhalinRybakSoyuz and Rassvet to stop doing business with UA, while Nadein contended that UA lost business because of Turner and UMG's

³ Turner argues that we should decline to reverse the trial court's order because Nadein presents a different argument on appeal than he presented to the trial court. He has not. Nadein argued in his opposition to UMG's summary judgment motion that (1) the successor liability rule did not apply and (2) UMG was liable for conversion. Nadein repeats the same arguments here.

actions. Because genuine issues of material fact exist and UMG was not entitled to judgment as a matter of law, the trial court erred by granting UMG's summary judgment motion.⁴ At oral argument, Nadein requested a new trial on damages only, but we remand for a full trial because the trial court never made findings on UMG's liability. We vacate the summary judgment order and remand for a new trial.⁵

II. Motion to Compel

Nadein also argues that the trial court erred by denying his motion to compel production of UMG's financial information because that information was relevant to proving damages. Because this issue is likely to reoccur on remand, we consider it and hold that the trial court abused its discretion by limiting Nadein's discovery.

We review a trial court's order limiting discovery for abuse of discretion. *Lang v. Dental Quality Assurance Comm'n*, 138 Wn. App. 235, 254, 156 P.3d 919 (2007), *review denied*, 162 Wn.2d 1021 (2008).⁶ A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775

⁴ Because genuine issues of material fact exist and UMG was not entitled to judgment as a matter of law, Nadein's burden on summary judgment never arose. *Young*, 112 Wn.2d at 225. Accordingly, we do not reach his arguments on *Lang*.

⁵ Turner waived his cross-appealed issues by not assigning error to them, making argument, or citing any authority in support of the cross-appeal. RAP 10.3(a)(6); *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986) ("Contentions unsupported by argument or citation of authority will not be considered on appeal"), *review denied*, 107 Wn.2d 1020 and *cert. denied*, 482 U.S. 916 (1987).

⁶ Turner appears to urge us to adopt the Seventh Circuit's standard for discovery rulings, that the appellant must make a clear showing that a discovery limitation resulted in actual and substantial prejudice for it to warrant reversal. We review such rulings for abuse of discretion. *Lang*, 138 Wn. App. at 254.

(1971). A trial court has broad discretion under CR 26 to manage the discovery process and, if necessary, limit the scope of discovery. CR 26(b), (c); *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 277, 191 P.3d 900 (2008), *review denied*, 165 Wn.2d 1033 (2009).

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. CR 26(b)(1). A party may serve on another party a request to produce documents that constitute or contain matters within the scope of CR 26(b) and that are in the possession, custody, or control of the party on whom the request is served. CR 34(a)(1). If a party disagrees with the scope of production requested during discovery, it must move for a protective order and cannot withhold discoverable materials. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 354, 858 P.2d 1054 (1993). The trial court may limit discovery if it determines that, among other reasons, the discovery is unduly burdensome or expensive. CR 26(b)(1)(a)(C).

Nadein contends that the financial information he requested is relevant to establish the value of assets Turner and UMG allegedly converted. Turner argues, without proof, that under the trial court's order, Nadein received all of UMG's financial information regarding clients UMG and UA had in common. Turner argues that Nadein is missing only financial information about clients that were not UA clients.

As we stated above, taking a company's goodwill without paying compensation is grounds for conversion. *Lang*, 136 Wn. App. at 719. UMG's financial documents related to UA's common clients were relevant to Nadein's conversion claim. Such documents would show whether assets were converted and help establish the value of the assets allegedly converted.

Nadein correctly points out that the trial court's discovery order did not require UMG to turn over its financial records of dealings with clients it had in common with UA. Although UMG had to produce agreements, volume of business, and communications it had with UA's common clients, it did not have to show receipts, accounts receivable, or other financial information that would demonstrate the value of its business with UA's common clients. This information could have helped Nadein establish the value of UA's goodwill. The trial court abused its discretion by denying Nadein's motion to compel production of UMG's financial documents regarding UA's common customers. We vacate this order as well.

Nadein conceded at oral argument that we need not reach his remaining issues if we vacate and remand. We therefore do not reach Nadein's remaining arguments.

Vacated and remanded for a new trial.

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 pursuant to RCW 2.06.040, it is so ordered.

We concur:

Bridgewater, P.J.

Hunt, J.

Quinn-Brintnall, J.