STATE OF MICHIGAN

COURT OF APPEALS

ACTUATOR SPECIALTIES, INC., Plaintiff-Appellee,	UNPUBLISHED December 1, 2011
V WILLIAM CHINAVARE, Defendant-Appellant, and CHRISTOPHER BAKER and PATRICK EMERSON, Defendants.	No. 297915 Monroe Circuit Court LC No. 08-024921-CZ

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant, William Chinavare, appeals as of right a permanent injunction that prohibited defendant[1] from working for any competitor of plaintiff, Actuator Specialties, Inc. (ASI), for a period of three years, ending on December 16, 2011. We affirm.

I. BASIC FACTS

Randy Wright and Wendy Wright are the co-owners of ASI and employ nine people. ASI is in the business of selling and repairing valve actuators, manufacturing and selling valve/actuator parts, and assembling and selling kits of valve/actuator parts. An actuator is a mechanical and electrical device that opens and closes valves. As an actuator's parts wear out, they must either be replaced or repaired.

[1] "Defendant" will refer solely to the appellant since the other codefendants are not involved on appeal. In fact, codefendant Patrick Emerson was voluntarily dismissed by ASI, and codefendant Scott Baker was dismissed via the trial court granting summary disposition in Baker's favor.

Defendant was hired at ASI in January 2003, and before he resigned, he was the general manager. In fact, defendant was considered "in charge" when Randy was not present. In March 2007, to aid in the handling of after-hour calls, defendant copied ASI files onto a USB drive he purchased. Defendant testified that when he returned home, he realized his (old) computer did not have a USB port, and that he could not transfer and use the data. Defendant said that as a result of being unable to use the USB drive, he simply stored the USB drive in a closet.

Later, on January 18, 2008, all three codefendants quit to begin working for Phoenix Partners, LLC, which did business as Renew Valve and Cleveland Valve & Gauge.[2] After the codefendants left ASI, Wendy discovered that some confidential files defendant would have had no reason to access, had been recently accessed on the ASI computer previously assigned to defendant. ASI sought a Temporary Restraining Order (TRO) on February 12, 2008, and the requested order was issued on February 15, 2008. The salient portions of the TRO required the following of the codefendants:

> A. They shall immediately deliver to [ASI] all originals and all copies of documents and data acquired from ASI, whether in hard copy or stored in other media, referring or related to ASI's parts, kits, suppliers, customers, or financial matters;
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> [section B was crossed out]
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> C. They shall not access or transmit any data to the internal computer network of any person or entity whose business offers goods or services competitive with ASI's, including but not limited to Renew Valve & Machine Co. and/or Cleveland Valve & Gauge, or any computer in the possession or control of any person employed by them or affiliated with them;
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> D. They shall not disclose, orally, electronically or in writing, any information to Renew Valve & Machine Co. and/or Cleveland Valve & Gauge, or any person employed by them or affiliated with them, any information the defendants acquired from ASI or derived from its documents or data, related to its parts, kits, suppliers, customers, or financial matters;
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> [section E was crossed out]
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> F. They shall not use, or disclose to anyone, information acquired during the course of their employment for ASI, or derived from its documents and data, that they have retained in their memory related to ASI's parts, kits, suppliers, customers, or financial matters;
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> [section G was crossed out]

[2] Referred to hereafter as "Renew Valve."

> H. They shall preserve all notes and other records and copies of all written and email communications among themselves referring or relating ASI's business, or referring or related to Renew Valve & Machine Co. and/or Cleveland Valve & Gauge, or any person employed by them or affiliated with them, and all notes and other records and copies of all written and email communications with Renew Valve & Machine Co. and/or Cleveland Valve & Gauge, or any person employed by them or affiliated with them which has been sent by or to any defendant;
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> [section I was crossed out]
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> J. They shall preserve, and not destroy or delete any documents or data which they have been ordered to preserve or deliver to ASI by this order; and
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> K. They shall immediately deliver to ASI all parts, kits, gaskets, kit breakdown sheets, tools, logo apparel, logo gratuities, uniforms and other property that they acquired from ASI or from a customer or supplier of ASI.

Notably, the TRO did *not* prohibit defendant from working for Renew Valve.

On February 13, 2008, one day after the TRO had been sought, defendant uploaded the data contained on the USB drive onto his Renew Valve computer. Defendant also changed the heading on an ASI order form he had copied to create a "Renew Valve" order form. Then on February 15, 2008, the date the TRO was issued, defendant faxed the newly created Renew Valve order form to a vendor. The vendor received the fax and sent a reply fax on February 18, 2008. However, the vendor mistakenly sent the reply fax to ASI because that is the company where it associated defendant's name. After ASI received the fax, Wendy recognized that defendant was using a form that appeared to have been derived from ASI forms, in apparent violation of the TRO that had been issued three days earlier.[3]

A computer forensics company hired by ASI to conduct an analysis concluded that there were hundreds of ASI files on either defendant's USB drive or on Renew Valve's computers and that, in addition, a missing or unidentified USB drive[4] had been inserted into defendant's ASI computer and later inserted into four computers at Renew Valve. This device has not been produced in the course of this litigation.

After the trial court granted the TRO, it held seven days of evidentiary hearings to determine whether a preliminary or permanent injunction should issue. At the conclusion of the hearings, the trial court issued a preliminary injunction enjoining defendant from working at

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[3] Even though the revised order form sorted the data differently and had Renew Valve's name on the letterhead, the form contained the same content as ASI's form, including the same typos.

[4] It is unknown whether the unidentified "USB drive" was an actual "thumb drive," but regardless of its physical characteristics (such as being a thumb drive, SD card, or phone with a flash card), it was a flash-memory device.

Renew Valve, or any similar competitor of ASI, for a period of three years, ending on December 16, 2011. On March 10, 2010, defendant requested that the trial court either dismiss the preliminary injunction or, in the alternative, convert it into a permanent one, such that an appeal of right could be taken. The trial court determined that the reasons for the injunction were still valid and converted the preliminary injunction into a permanent injunction, which kept the three-year prohibition of work.

II. ANALYSIS

A trial court's decision to grant an injunction is reviewed for an abuse of discretion. *Mich Coalition of State Employee Unions v Mich Civil Service Comm'n*, 465 Mich 212, 217; 634 NW2d 692 (2001). A trial court abuses its discretion when its decision falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Defendant argues that the trial court abused its discretion when it enjoined defendant from working at Renew Valve for a period of three years. We disagree.

At the outset, defendant does not contend that any of the trial court's factual findings were erroneous or that an injunction was not warranted. Instead, defendant only argues that a single provision in the injunction, preventing him from working at any competitor of ASI, was improper. We also note that defendant's brief on appeal included an affidavit that was not presented to the trial court. Because defendant did not move to amend the record pursuant to MCR 7.216(A)(4) and review is limited to the record presented to the trial court, we will not consider it. *Mich AFSCME Council 25 v Woodhaven-Brownstown School Dist*, ___ Mich App ___; ___ NW2d ___ (Docket No. 299945, issued May 3, 2011), slip op, p 1.

Michigan's Uniform Trade Secrets Act (MUTSA), MCL 445.1901 et seq., authorizes the use of injunctive relief. MCL 445.1903 provides the following:

> (1) Actual or threatened misappropriation may be enjoined. Upon application to the court of competent jurisdiction, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.
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> * * *
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> (3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

For a party to obtain an injunction under the premise of "threatened misappropriation" of trade secrets, "the party must establish more than the existence of generalized trade secrets and a competitor's employment of the party's former employee who has knowledge of trade secrets." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 134; 649 NW2d 808 (2002). Here, ASI did just that. ASI showed that not only did defendant possess confidential ASI data, defendant also downloaded that data onto Renew Valve's computer system and utilized that data for the benefit of Renew Valve. In addition, despite the knowledge of the entry of a TRO that

specifically compelled defendant to turn over such data to ASI, defendant failed to do so. Significantly, defendant did not admit to having an ASI USB drive or return it to ASI until ASI learned of defendant's use of an ASI electronic form and confronted Renew Valve with the information.

Defendant's behavior is similar to the behavior of the defendant in the Seventh Circuit case of *PepsiCo, Inc v Redmond*, 54 F3d 1262 (CA 7, 1995).[5] This Court previously summarized *PepsiCo* as follows:

> In that case, the plaintiff sought a preliminary injunction against another company and its employee to prevent its employee, a former employee of plaintiff who had signed a confidentiality agreement, from divulging plaintiff's trade secrets and confidential information and from assuming specific duties. *Id.* at 1263, 1264. A statute in Illinois that is similar to Michigan UTSA "provides that a court may enjoin the 'actual or threatened misappropriation' of a trade secret." *Id.* at 1267. The Seventh Circuit Court of Appeals explained that a "plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets." *Id.* at 1269. The Seventh Circuit Court of Appeals affirmed the district court's grant of a preliminary injunction, finding that the plaintiff established a sufficient likelihood of success despite the lack of evidence that the defendant had used or planned to use any trade secrets. *Id.* at 1271. However, the employee in PepsiCo demonstrated a lack of trustworthiness beyond his decision to work for a competitor. *Id.* at 1270. [*CMI Int'l*, 251 Mich App at 133 (footnote omitted).]

In *PepsiCo*, the "lack of trustworthiness" was evidenced by the former employee accepting a position with a competitor, while still employed at PepsiCo, and lying to PepsiCo and his colleagues about it. *PepsiCo*, 54 F3d at 1264. The district court explained:

> Redmond's lack of forthrightness on some occasions, and out and out lies on others, in the period between the time he accepted the position with [PepsiCo's competitor] and when he informed plaintiff that he had accepted that position leads the court to conclude that defendant Redmond could not be trusted to act with the necessary sensitivity and good faith under the circumstances in which the only practical verification that he was not using plaintiff's secrets would be defendant Redmond's word to that effect. [*Id.* at 1270.]

The district court also pointed out that the potential new employer seemed to express an "unnatural interest" in hiring PepsiCo employees. *Id.* at 1271. The district court determined that this showed a willingness on part of the new employer to seek out and use PepsiCo's trade secret information. *Id.*

[5] The trial court relied upon *PepsiCo* in entering the permanent injunction in ASI's favor.

Here, defendant's conduct raises the same warning flags regarding his willingness to use trade-secret information. First, Wendy testified that within the three days before defendant's resignation, someone used defendant's computer to access many confidential computer files that defendant would not have had a reason to access during that time. Second, despite knowing that a TRO was being sought and thereafter was issued, defendant claims that he failed to recognize or did not "think" that the USB drive that he copied the ASI files onto was covered under the TRO. This explanation rings hollow in the face of the incredible coincidence that defendant brought the USB drive into work and copied the ASI files to the Renew Valve computer one day after the TRO was sought, two days before the TRO was issued. Third, defendant altered one of the ASI files by replacing the ASI letterhead with his new employer's name, "Renew Valve," showing a willingness to use information surreptitiously taken from ASI. Further, in addition to the fact that 462 ASI files were found on either defendant's USB drive or on Renew Valve's computers, the evidence showed that only some of the files downloaded to a second, missing or unidentified, USB device from defendant's ASI computer, and later inserted into four computers at Renew Valve, were downloaded onto the Renew Valve computers. Because this second device is still unaccounted for, and its content is unknown, the trial court did not err in finding a lack of trustworthiness on defendant's behalf.

Finally, similar to PepsiCo's competitor, the evidence showed that there was questionable behavior by Renew Valve to add support to a finding of lack of trustworthiness sufficient to support the employment prohibition ordered by the trial court. In addition to hiring the three codefendants away from ASI at the same time, Renew Valve used refreshed portions of a PowerPoint presentation created by ASI as its own. The trial court could properly infer that Renew Valve's willingness to use ASI materials that it does not own or have permission to use indicates Renew Valve's willingness to misappropriate trade secret information.

We conclude on this record therefore, that the trial court did not abuse its discretion in finding that ASI had established a willingness to use and/or disseminate trade-secret data, such that entry of an injunction to prevent any threatened misappropriation of trade secrets was warranted. MCL 445.1903(1).

Defendant next claims that the three year prohibition of working for a competitor is unprecedented. While there are no cases directly on point, the Michigan Supreme Court did imply that temporary work restrictions are valid. In *Hayes-Albion v Kuberski*, 421 Mich 170, 188-189; 364 NW2d 609 (1984), the Court found that a *perpetual* ban on the defendant from working in a particular industry was improper and "too restrictive because it prohibits defendants from competing with plaintiff even if plaintiff's trade secrets become common knowledge." *Id.* at 189. Thus, *Hayes-Albion* stands for the proposition that an employment ban that "fail[s] to strike the proper balance," *Id.* at 188, is improper. Here, because the period of the injunction was limited to three years and was not permanent, the trial court's order does not run afoul of the concerns raised in *Hayes-Albion*.

MCL 445.1903(1) allows for injunctive relief to last "for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation." This "reasonableness" standard is similar to how courts enforce covenants not to compete. Such covenants must also be "reasonable" in light of the surrounding circumstances. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 506; 741 NW2d 539 (2007).

Here, ASI presented evidence that defendant had a willingness to access and/or use confidential information that was taken from ASI and that there was still an unaccounted USB storage device. Thus, the potential harm to ASI was severe if defendant was allowed to continue to work for Renew Valve. On the other hand, the potential harm to defendant was minimal. Defendant testified that he had "plenty of places" he could have worked instead of Renew Valve and could have made nearly the same $95,000 salary. Additionally, ASI presented evidence that its data took over ten years to compile. Thus, the fact that the trial court only imposed a three-year restriction makes the limitation facially reasonable with respect to its duration. See MCL 445.1903(1); *Televation Telecomm Sys, Inc v Saindon*, 522 NW2d 1359, 1366 (Ill App, 1988) (injunctions should not last longer than the time required to duplicate the product by lawful means).

In sum, because ASI established a threat of misappropriation, the MUTSA permitted the trial court to enjoin defendant from working for a competitor of ASI. And furthermore, the three-year limitation was reasonable when considering all of the circumstances as a whole. As a result, defendant cannot show how the trial court abused its discretion when it fashioned this relief to ASI, and defendant's claim fails. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens