



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00693-CV

Christopher Michael **HUGHES**,
Appellant

v.

AGE INDUSTRIES, LTD.,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 16-1893-CV
Honorable W.C. Kirkendall, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: March 8, 2017

AFFIRMED

Christopher Michael Hughes appeals the trial court's order granting a temporary injunction in favor of Age Industries, Ltd. ("AI"). Hughes contends the trial court erred in granting the temporary injunction because: (1) AI's petition failed to meet the requirements of TEX. R. CIV. P. 682; (2) the temporary injunction does not maintain the status quo; (3) AI failed to plead a proper cause of action under the Texas Uniform Trade Secrets Act or, if properly pled, AI failed to offer proof of the elements of that cause of action; (4) AI has not shown a probable, imminent,

irreparable injury; and (5) the temporary injunction order does not satisfy the requirements of TEX. R. Civ. P. 683. We overrule each of these contentions and affirm the trial court's order.

BACKGROUND

Hughes was employed by AI for almost twenty years. AI is a manufacturer of corrugated packaging material, and Hughes was employed as the general manager of one of AI's branch facilities. Hughes is also a limited partner of AI.

Hughes resigned from the board of directors of AI's general partner on May 16, 2016, and from his employment with AI on June 22, 2016. Before submitting his resignations, Hughes was engaged in discussions with John J. Bradley, Jr. and John W. McLeod, Jr. regarding the formation of a business to compete with AI. McLeod filed a certificate with the Texas Secretary of State on June 7, 2016, to form Diamondback Corrugated Container, LLC. After resigning from AI, Hughes was employed by Diamondback as its operations manager.

On August 30, 2016, AI sued Hughes, Bradley, and Diamondback asserting various claims including a claim for misappropriation of trade secrets. AI obtained a temporary restraining order that same day. The temporary restraining order was subsequently extended to the date scheduled for the hearing on AI's temporary injunction application.

At the temporary injunction hearing, Diamondback agreed to an order requiring it to deliver to AI a copy of all documents and proprietary information belonging to AI that were in Diamondback's possession. Diamondback further agreed to refrain from directly or indirectly disclosing or using AI's proprietary or trade secret information.

AI's chief operating officer, William Allen, and Hughes testified at the temporary injunction hearing. At the conclusion of the hearing, the trial court granted a temporary injunction against Hughes. The temporary injunction order requires Hughes to deliver a list describing all documents belonging to AI or containing proprietary information belonging to AI in Hughes's

possession, “including but not limited to [AI’s] customer and prospective customer lists and contact information, pricing lists, sales journals, financial reports, vendor lists, engineering diagrams, customer presentation material, specialized pricing programs, business strategies, and specially developed programs for specific customers.” The order further enjoins Hughes from directly or indirectly disclosing or using AI’s proprietary or trade secret information, “including making use of [AI’s] customer and prospective customer lists and contact information, pricing lists, sales journals, financial reports, vendor lists, engineering diagrams, customer presentation material, specialized pricing programs, business strategies, and specially developed programs for specific customers.” Hughes appeals the trial court’s order granting the temporary injunction.

TEMPORARY INJUNCTION ELEMENTS AND STANDARD OF REVIEW

“To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). We review a trial court’s order granting a temporary injunction under an abuse of discretion standard. *Id.* Under an abuse of discretion standard, we “cannot overrule the trial court’s decision unless the trial court acted unreasonably or in an arbitrary manner, without reference to guiding rules and principles.” *Id.* at 211. We also cannot substitute our judgment for the judgment of the trial court, including with regard to the credibility of witnesses, and we draw all legitimate inferences from the evidence in the manner most favorable to the trial court’s judgment. *Id.* at 211; *Menna v. Romero*, 48 S.W.3d 247, 252 (Tex. App.—San Antonio 2001, pet. disp’d w.o.j.). “The trial court does not abuse its discretion if some evidence reasonably supports the trial court’s decision.” *Butnaru*, 84 S.W.3d at 211.

ADEQUACY OF AI'S PETITION

Hughes first contends the trial court erred in granting the temporary injunction because AI's petition does not satisfy the requirements of TEX. R. CIV. P. 682. Hughes specifically challenges Allen's verification of the petition. *See* TEX. R. CIV. P. 682 (requiring petition to be verified by an affidavit). "A verified petition for injunctive relief is not required to grant a temporary injunction, however, when a full evidentiary hearing on evidence independent of the petition has been held." *Mattox v. Jackson*, 336 S.W.3d 759, 763 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also Salas v. Chris Christensen Sys., Inc.*, No. 10-11-00107-CV, 2011 WL 4089999, at *5 (Tex. App.—Waco Sept. 14, 2011, no pet.) (mem. op.) (same); *Georgiades v. Di Ferrante*, 871 S.W.2d 878, 882 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (same). Because the trial court held a full evidentiary hearing in the underlying cause, Hughes's complaint regarding AI's petition is overruled.

STATUS QUO

Hughes next contends the trial court erred in granting a temporary injunction that does not maintain the status quo. Hughes's contention is based on his status as a limited partner of AI. As a limited partner, Hughes asserts he is entitled to receive information regarding AI under the terms of the partnership agreement. Therefore, Hughes contends requiring him to account for the information in his possession changes the status quo.

The purpose of a temporary injunction "is to preserve the status quo of the litigation's subject matter pending a trial on the merits." *Butnaru*, 84 S.W.3d at 204. "The 'status quo' is the last, actual, peaceable, non-contested status which preceded the pending controversy." *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016) (internal quotations omitted).

At the temporary injunction hearing, Hughes testified the only information he received as a limited partner was audited financial statements. Hughes admitted he did not receive sales

journals, customer lists, or pricing information in his capacity as a limited partner. From this testimony, the trial court could reasonably infer that in his capacity as a limited partner, Hughes did not receive any of the following information specifically referenced in the trial court's order: AI's "customer and prospective customer lists and contact information, pricing lists, sales journals, financial reports [other than audited financial statements], vendor lists, engineering diagrams, customer presentation material, specialized pricing programs, business strategies, and specially developed programs for specific customers." Therefore, the trial court could reasonably have inferred Hughes only received this other information in his capacity as an employee of AI.

As an employee of AI, Hughes was subject to the employee handbook which states, "All information regarding the Company, equipment, products, management, customers, computers, etc., is confidential and should be treated as such." The handbook also instructs employees not to discuss AI's business affairs with third parties and notes that AI's confidential information includes the "pricing of our products and services, the names of our customers, and the areas in which we do business or plan to operate" and AI's "earnings." "Even apart from [the employee handbook], a fiduciary relationship arises from an employment relationship forbidding an employee from using trade secrets or confidential or proprietary information in a manner adverse to the employer." *Mabrey v. SandStream, Inc.*, 124 S.W.3d 302, 316 (Tex. App.—Fort Worth 2003, no pet.); *see also Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC*, 404 S.W.3d 737, 752 (Tex. App.—El Paso 2013, no pet.) (noting employee has fiduciary duty to employer not to misappropriate trade secrets or "take away information such as customer lists"); *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 512 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (noting employee may not appropriate a company's trade secrets or "carry away confidential information, such as customer lists"). This obligation survives the termination

of the employment relationship. *Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 424 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *Mabrey*, 124 S.W.3d at 316.

Given the limited information Hughes received as a limited partner and the extensive information he had access to as an employee, the trial court did not abuse its discretion in determining the status quo restricted Hughes's ability to possess, disclose, and use the categories of confidential information listed in the temporary injunction order. Therefore, requiring Hughes to account for that information did not change the status quo.

AI'S ALLEGATION OF A CAUSE OF ACTION

Hughes next contends AI failed to allege a proper cause of action against him. In making this argument, Hughes focuses on a reference AI's attorney made during the temporary injunction hearing about the common law. Hughes correctly asserts the Texas Uniform Trade Secrets Act (the "Act") displaced the common law with regard to a claim for misappropriation of a trade secret. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007 (West Supp. 2016) (stating that Act "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret"). We disagree, however, that the petition fails to allege a proper cause of action.

In order to obtain the temporary injunction, AI was first required to plead a cause of action against Hughes. *Butnaru*, 84 S.W.3d at 204. A petition is "liberally construed in favor of the pleader." *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). "The object and purpose of pleading is to give fair and adequate notice to the party being sued of the nature of the cause of action asserted against him." *Bowen v. Robinson*, 227 S.W.3d 86, 91 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *see also Roark*, 633 S.W.2d at 809 (noting "petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim"). Notice is sufficient if

the opposing party has “information sufficient to enable him to prepare a defense.” *Roark*, 633 S.W.2d at 809; *Bowen*, 227 S.W.3d at 91.

Section 134A.003(a) of the Act provides injunctive relief for the misappropriation of a trade secret. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.003(a). In the factual background of its petition, AI references section 134A.002(6) of the Act which sets forth the definition of “trade secret.” *Id.* at § 134A.002(6). AI’s petition also asserts a claim entitled “Misappropriation of Trade Secret,” alleging:

Plaintiff owns trade secrets. Defendants, with others yet undisclosed, used or disclosed the trade secrets in violation of a confidential relationship with Plaintiff or after acquiring the trade secrets by improper means without authorization from Plaintiff. The misappropriation proximately caused Plaintiff injury.

After reviewing AI’s petition, we hold the petition sufficiently alleged a misappropriation claim under the Act. Therefore, we overrule Hughes’s contention.

PROBABLE RIGHT TO RELIEF

Hughes next contends AI failed to offer evidence of the required elements of a misappropriation claim under the Act. Specifically, Hughes contends AI failed to offer evidence to prove the existence of a trade secret. Hughes also contends no evidence was offered to show he misappropriated any confidential information through improper means because he possessed the information as a limited partner.

The second element AI was required to establish was a probable right to the relief sought. *Butnaru*, 84 S.W.3d at 204. At a temporary injunction hearing, the applicant is not required to present the underlying merits of the controversy or to establish the applicant will ultimately prevail. *See LasikPlus of Tex., P.C. v. Mattioli*, 418 S.W.3d 210, 216 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *City of Dall. v. Brown*, 373 S.W.3d 204, 208 (Tex. App.—Dallas 2012, pet. denied); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 597 (Tex. App.—Amarillo 1995, no pet.).

Instead, the applicant must show a probability of success by presenting evidence which tends to sustain the cause of action. *See LasikPlus of Tex., P.C.*, 418 S.W.3d at 216; *City of Dall.*, 373 S.W.3d at 208; *Miller Paper Co.*, 901 S.W.2d at 597.

The Act defines the term “trade secret” as:

information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6). In the temporary injunction context, a trial court does not decide whether the information sought to be protected is a trade secret; rather it determines whether the applicant has established the information is entitled to trade secret protection until a trial on the merits. *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 860 (Tex. App.—Fort Worth 2003, no pet.); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 24 (Tex. App.—Houston [1st Dist.] 1998, pet. dismissed). Pricing information and customer lists have been shown to be trade secrets. *Fox*, 121 S.W.3d at 859; *T-N-T Motorsports, Inc.*, 965 S.W.2d at 22.

At the temporary injunction hearing, Allen testified that while Hughes was employed by AI, Hughes had access to the following proprietary information and trade secrets: (1) customer lists; (2) customer pricing; (3) specialized customer pricing and service programs; (4) sales journals; (5) financial reports; (6) vendor lists; (7) engineering diagrams; (8) customer presentation materials; and (9) business strategies. Allen testified this proprietary information was developed over the course of many years at great expense, was very valuable to AI, and was unknown to third

parties. Similarly, Hughes admitted during his testimony that AI's customer lists and price lists are not available to the general public. Finally, Allen testified AI's employee handbook instructed employees to maintain the confidentiality of AI's information. We hold the foregoing is some evidence of AI's trade secrets.

The Act defines "misappropriation" to include the use of a trade secret by a person whose knowledge of the trade secret was "acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." *Id.* at § 134A.002(3)(B)(ii)(b). In this case, the testimony established Hughes's knowledge of AI's customer lists, sales journals, and price lists was acquired as a result of his employment by AI. As previously noted, in addition to the provisions of the employee handbook which required Hughes to keep this information confidential, Hughes had a fiduciary duty arising from his employment relationship to maintain the confidentiality of the information. *See Cuidado Casero Home Health of El Paso, Inc.*, 404 S.W.3d at 752; *Mabrey*, 124 S.W.3d at 316; *Abetter Trucking Co.*, 113 S.W.3d at 512. We hold the foregoing is some evidence that Hughes's knowledge of AI's trade secrets was "acquired under circumstances giving rise to a duty to maintain its secrecy" and not in Hughes's capacity as a limited partner. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(3)(B)(ii)(b).

PROBABLE, IMMINENT, IRREPARABLE INJURY

Hughes next contends AI did not produce any evidence of a probable, imminent, and irreparable injury. Hughes asserts Allen's testimony only established a fear of possible injury which is insufficient. Hughes also asserts AI failed to offer evidence that it lacked an adequate remedy at law.

The final element AI was required to establish to obtain a temporary injunction was a probable, imminent, and irreparable injury. *Butnaru*, 84 S.W.3d at 204. "An injury is irreparable

if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard.” *Id.*

Because the very purpose of an injunction is to prevent disclosure of trade secrets pending trial, an applicant is not required to show the defendant is actually using the information. *Fox*, 121 S.W.3d at 860; *see also Hill v. McLane Co.*, No. 03-10-00293-CV, 2011 WL 56061, at *5 (Tex. App.—Austin Jan. 5, 2011, no pet.) (mem. op.). Instead, the applicant must show the defendant possesses the trade secrets and is in a position to use them. *HMS Holdings Corp. v. Pub. Consulting Group, Inc.*, No. 05-15-00925-CV, 2016 WL 1179436, at *4 (Tex. App.—Dallas Mar. 28, 2016, no pet.) (mem. op.); *Hill*, 2011 WL 56061, at *5; *Fox*, 121 S.W.3d at 860. Similarly, with regard to whether damages provide a sufficient remedy, “Injunctive relief is proper to prevent a party, which has appropriated another’s trade secrets, from gaining an unfair market advantage.” *T-N-T Motorsports, Inc.*, 965 S.W.2d at 24; *see also Sharma*, 231 S.W.3d at 427 (same). In those circumstances, “[t]he only effective relief available to [the applicant] is to restrain [the defendant’s] use of its trade secrets and confidential information pending trial.” *T-N-T Motorsports, Inc.*, 965 S.W.2d at 24. This is true because if the defendant uses the trade secrets and confidential information prior to trial, the potential damage to the applicant’s business could not be easily calculated. *Sharma*, 231 S.W.3d at 427; *T-N-T Motorsports, Inc.*, 965 S.W.2d at 24.

In this case, evidence was admitted that Hughes downloaded a large amount of data from his computer the month before he resigned.¹ In addition, evidence was presented that financial information Hughes maintained for 2015 and 2016 could not be located after Hughes left employment. Hughes also admitted having confidential information belonging to AI on his home

¹ During cross-examination, Hughes’s attorney challenged Allen’s understanding of the information contained in a third party contractor’s report showing Hughes had connected a USB storage device to AI’s computer on May 24th and May 26th. The trial court, however, was the sole judge of Allen’s credibility and the weight to be given his testimony and the third party contractor’s report.

computer. Although Hughes searched his computer for files that contained such confidential information, Hughes admitted he had not searched his emails to determine if they contained confidential information. Based on the foregoing evidence, the trial court did not abuse its discretion in implicitly finding that Hughes is in possession of AI's trade secrets.

The evidence also established that Hughes is the operations manager for Diamondback, a company formed to compete with AI. In his testimony at the hearing, Hughes was asked whether he sent Bradley emails containing AI's proprietary information. Although Hughes stated it would be out of character to do so, he could not testify under oath that none of his emails to Bradley contained any such information, and, as previously noted, he admitted he had not searched the emails on his home computer to determine if they contained confidential information.² In addition, Hughes deleted all of the emails from the deleted folder of his work computer. Because the record contains some evidence that Hughes is in a position to use AI's trade secrets to gain an unfair market advantage, the trial court did not abuse its discretion in concluding AI established a probable, imminent, irreparable injury.³

² The testimony is as follows:

Q. You testified, I believe, that you went through all of your e-mails to determine and documents to determine what, if anything, you had belonging to [AI]; is that — or related to [AI]; is that correct?

A. No, ma'am. I think I — I believe I just searched my computer for files.

Q. Okay. What have you not searched?

A. I haven't done a — a search of my personal or business e-mail accounts. I just looked for files that were stored.

Q. Okay. So you can't sit here and testify under oath that none of the e-mails to [Bradley] contained proprietary information of [AI], can you?

A. No. I just know it — it would be out of character — out of character for me to do so, so I would doubt it very strongly.

³ In his reply brief, Hughes cites *DGM Servs., Inc. v. Figueroa*, No. 01-16-00186-CV, 2016 WL 7473947, at *4 (Tex. App.—Houston [1st Dist.] Dec. 29, 2016, no pet.) (mem. op.), as rejecting a presumption of probable injury where a company established its former employee breached a non-compete agreement. In that case, however, the Houston court was reviewing a trial court's order denying a temporary injunction; therefore, the Houston court drew all legitimate inferences in favor of that order. *See id.* at *2-3. Viewing the evidence in that light, the Houston court noted, "despite waiting nearly six months to seek a temporary injunction, DGM could not establish what information, if any, Figueroa had used to DGM's detriment." *Id.* at *4. In this case, we draw all legitimate inferences in favor of the trial court's order granting the temporary injunction. In this light, AI filed its lawsuit only two months after Hughes resigned, and Hughes could not testify under oath that he had not sent Bradley any emails containing AI's proprietary

ORDER SATISFIES TEX. R. APP. P. 683

Hughes finally contends the trial court's order does not meet the requirements of TEX. R.

Civ. P. 683. We disagree.

Rule 683 provides:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

TEX. R. CIV. P. 683.

Hughes first asserts the order's requirement that he list all documents belonging to AI or containing AI's proprietary information is overbroad. The order, however, provides an express list of specific examples of the type of information Hughes was required to list which included "customer and prospective customer lists and contact information, pricing lists, sales journals, financial reports, vendor lists, engineering diagrams, customer presentation material, specialized pricing programs, business strategies, and specially developed programs for specific customers."

Hughes next asserts the order's requirement that he refrain from directly or indirectly disclosing the information is overbroad since he is not restricted from competing with AI. The order, however, does not restrict Hughes from competing. Instead, it refrains Hughes, as a former employee of AI, from disclosing and using AI's confidential information.

CONCLUSION

The trial court's order is affirmed.

Sandee Bryan Marion, Chief Justice

information, in part because he had not searched his emails to make that determination. Therefore, even if the Houston court is correct in rejecting a presumption of probable injury, the facts in *Figueroa* are readily distinguishable.