2014 IL App (5th) 140080-U

NO. 5-14-0080

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

XYLEM DEWATERING SOLUTIONS, INC., d/b/a GODWIN PUMPS OF AMERICA and HEARTLAND PUMP RENTAL AND SALES, INC.,	)	Appeal from the Circuit Court of Williamson County.
Plaintiffs-Appellants,	)	
v.	)	No. 13-CH-139
CHRISTOPHER SZABLEWSKI, CRAIG RAHLFS, and C AND C PUMPS AND SUPPLY, INC.,	)	Honorable Carolyn B. Smoot, Judge, presiding.
Defendants-Appellees.	)	

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Spomer and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: Where it was not an abuse of discretion to find that the plaintiffs had not established the grounds necessary for relief, the trial court's denial of the plaintiffs' motion for a preliminary injunction is affirmed.

¶ 2 The plaintiffs-appellants, Xylem Dewatering Solutions, Inc. (Xylem), doing business as Godwin Pumps of America (Godwin) and Heartland Pump Rental and Sales, Inc. (Heartland), sought a preliminary injunction to prevent two former employees, defendants-appellees Christopher Szablewski and Craig Rahlfs, from continuing operation of C and C Pumps and Supply, Inc. (C and C), a rival company. In support of

the motion, the plaintiffs contend that the defendants improperly interfered with Heartland business relationships, breached an employee nonsolicitation agreement, and utilized Heartland trade secret information in the operation of their new business. After a hearing, the circuit court of Williamson County entered an order denying the motion. The plaintiffs filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Jan. 1, 2003). We affirm the judgment of the circuit court of Williamson County.

¶ 3 Heartland is a rental and sales company that services the local coal mining industry through the provision of pumps, piping, service, and repairs. Heartland's commission-based sales representatives pursue sales through in-person presentations, and also by cold-calling potential customers, receiving referrals, and subscribing to third-party notification services. Heartland's Carterville, Illinois, branch competes with numerous other pump supply companies in southern Illinois, renting and selling pumps manufactured by Godwin, Stancor, BJM, Hydroflo, and various other brands. Heartland was a distributor of Godwin pumps for 17 years before being purchased by Godwin through Xylem in October 2012.

¶ 4 Defendants Szablewski and Rahlfs worked as outside sales representatives for Heartland for seven and eight years, respectively. The defendants became increasingly unhappy with the administrative demands imposed by Godwin after its acquisition of Heartland, and they resigned in mid-July, 2013. The defendants incorporated C and C on August 8, 2013.

¶ 5 Since C and C began operations, it has hired seven former Heartland employees, both clerical and nonclerical: Jessica Zainitzer, Joyce Riggs, Marvin Abbey, Nathan Gibson, Jeff Kinney, Jerry Krelo, and Mike Rauch. At the hearing on the plaintiffs' motion for preliminary injunction, deposition testimony entered into the record revealed that at the time of the acquisition, a policy was in place that required employees to sign noncompete agreements; however, due to an issue within the human resources department, the employees who left to work for C and C never signed such agreements for Heartland.

¶ 6 Heartland keeps its customer and pricing information on a server-based, password-protected software program called Rental Rates. Inside salespeople, who work from Heartland's office to facilitate orders and rentals, use the program to create price quotes for customers. Outside salespeople are not trained in the use of the program and do not have access to it.

¶ 7 Ken Albaugh, Heartland's regional manager, testified that Rahlfs had told him that he was not leaving Heartland to start his own company, but that Rahlfs resigned a few days later. He testified that after the defendants' resignations, Heartland lost key distributors to C and C, including Stancor Pumps and BJM Pumps. He noted that there were not completely reasonable substitutes for Stancor and BJM pumps in Heartland's product line; though he agreed that Flygt pumps, a comparable Xylem-owned brand, was sold at other locations, Flygt was not sold at Heartland's Carterville location because Xylem had a distributorship contract with another local company called Mine Supply. He stated that Heartland also lost its exclusive relationship with Hydroflo Pumps, but

agreed that Xylem owns a comparable brand called Goulds. Albaugh testified: "[The distributors] were told that [Heartland] w[as] going in a different direction, and that we were going to be dropping them and their products. And they were concerned that we weren't going to support them and work with them long-term." He agreed that he did not have personal knowledge of whether or not Stancor cancelled its agreement because of a discussion with C and C, as Stancor had sent a letter to Heartland cancelling the distributorship agreement due to disappointing sales.

¶ 8 Regarding customers, Albaugh testified that Heartland no longer did business with one of its customers, American Coal, formerly assigned to Szablewski. He also noted that Heartland had "lost work" for another customer, Sugar Camp Energy; however, Heartland had done sales and rentals to it since the defendants' departure. He stated that those customers told Heartland that they left because "they were told [Heartland] w[as] getting out of the full-service industry and w[as] going in different directions." Albaugh testified that Heartland still rents and sells the Godwin, Stancor, BJM, and Hydroflo pumps currently in inventory. He noted that there was never any plan to abandon Heartland's "full-service" traditional line of business, and that Godwin products alone cannot fill all of Heartland's servicing needs.

¶ 9 Albaugh testified that Riggs and Zainitzer were clerical employees, but he felt that Abbey and Gibson were "technical inside sales" valued for their technical knowledge, not their clerical skills. Heartland marked its price quotes to customers as "confidential," but none of the customers at issue signed an agreement to that effect.

¶ 10 Craig Rahlfs testified that before his employment at Heartland, he had worked as an outside salesperson for Vandevanter Engineering, a Godwin-owned company. Rahlfs stated that his communication regarding C and C began with Stancor, BJM, and Hydroflo around May 1, 2013. He stated that he inquired as to how the suppliers felt about the idea of the defendants forming a new company, and agreed that this inquiry's purpose was to discover whether the suppliers would be amenable to supporting C and C. He stated that he told customers and suppliers that he "felt [Heartland] was going in a different direction and [was going to] focus on Godwin pump rentals." He agreed that despite what he told his customers about Heartland's future, he was never explicitly told by anyone at Heartland that it was getting out of the full-service business. He stated that he formed this impression from conversations he had both with Albaugh and with a Godwin corporate trainer during the Heartland employees' postacquisition training. He stated that he also suspected a change because Xylem owned numerous competing pump manufacturers, such as BJM and Stancor's competitor, Flygt, and Hydroflo's direct competitor, Goulds. He noted that he had started to correct his misstatements to customers within the weeks preceding the hearing.

¶ 11 Rahlfs stated that he did not sign a noncompete agreement, either before or after Heartland's acquisition, and also did not sign an agreement for a bonus in exchange for not hiring former Heartland employees. Rahlfs testified that he was in charge of hiring at C and C, and he hired former Heartland employees. He noted that he did not offer anyone a job prior to leaving Heartland, and that three employees were hired in response

to a newspaper and internet advertisement C and C placed on August 8, 2013, seeking experienced pump repair mechanics and HDPE pipe fusion technicians.

¶ 12 Rahlfs testified that he did not have training on the use of Rental Rates. He stated that he received pump pricing information from the manufacturers and determined markups or discounts based on the prevailing market, and that he had to get permission to go above or below a certain dollar amount. He testified that other than his knowledge and experience, he did not take anything from Heartland with him for use on behalf of C and C.

¶ 13 Christopher Szablewski testified that he told customers that Heartland was going in a different direction, and that C and C intended to service the mines as Heartland had historically. He agreed that it was wrong to tell customers that Heartland was going out of the full-service business, but that he never said anything like that to his customers, which included American Coal. He testified that he worked on a Sugar Camp project while he was still a Heartland employee, but bid on and received the work after leaving, on behalf of C and C.

¶ 14 Szablewski testified that he never signed an agreement not to compete with Heartland, but agreed that he signed a document on May 24, 2012, in anticipation of Xylem's acquisition of Heartland. Szablewski testified that the agreement stated that he would receive a bonus in September 2013, in exchange for agreeing not to solicit or hire certain nonclerical Heartland employees for one year following termination of his employment. He noted that he never received the bonus, but had no reason to believe that he would not have received it if he had remained at Heartland. He testified that

before leaving Heartland, he told some other employees of his intention to start C and C, to "get an idea–they w[ere] my friends–to see what they thought," and that he did hire some Heartland employees after signing the agreement.

¶ 15 The agreement, a letter to Szablewski entitled "bonus agreement," provided that Szablewski was at all times an at-will employee of Heartland. The agreement stated that Szablewski would be entitled to the bonus award only so long as he remained continuously employed through the applicable payment date, which was 12 months, and again at 24 months, following the consummation of the sale of Heartland to Xylem. He would not be entitled to the award if he resigned his employment. It further prohibited Szablewski from soliciting for hire any nonclerical employee of Heartland or Godwin for a one-year period following the termination of his employment; however, that provision did not apply "to any former employee of Godwin or any of its affiliates ... who responds to a public advertisement placed by you so long as you do not specifically target such employees."

¶ 16 Szablewski stated that while he was employed as a Heartland salesperson, most new customers were found by cold-calling and word of mouth, and that is also how he does business at C and C. He testified that while at Heartland, Marvin Abbey and Jennifer Gerlock prepared his quotes because he "didn't know anything about it." He stated that a price quote to a customer is no longer a secret once it is submitted, and "[t]hat's something in sales you see quite a bit." Szablewski agreed that one of his employees was in possession of Heartland materials that he should not have had. However, Szablewski testified that he did not take any Heartland materials with him for

use at C and C, and that he did not start working on C and C's behalf while still employed by Heartland.

¶ 17 Marvin Abbey testified that he worked at Heartland as an inside sales representative before starting at C and C on August 18, 2013. He stated that his job was to send quotes out to customers and take product orders over the phone. He noted that part of his job entailed preparing price quotes for customers. If the item was for sale, he determined the price quote using the computer; if it was a rental item, the information came from the "price books," or the Heartland Quick Rates rental guide. He stated that suppliers normally changed their prices once per year, and Heartland rental rate pricing guides changed every one to two years.

¶ 18 During discovery, C and C produced Heartland documents from Marvin Abbey's home computer, including a 2006 rental pricing guide, a January 2013 employee contact list, and a January 2013 incomplete price quote to a customer for a Godwin pump.[1] Abbey testified that he occasionally worked from home, which was an acceptable practice at Heartland; for this reason, he had some Heartland documents saved to his personal computer, including a Heartland rental guide dated June 1, 2006. He noted,

[1]The remaining documents included: 2009 and 2010 pricing guides from supplier BJM; 2004 and 2008 BJM technical data sheets; 2002-2006 Godwin marketing materials; a 2009 BJM email containing pump list prices; OSHA documents and safety materials; and some personal memoranda, including a workplace complaint and a request for time off.

however, that because of the considerable variation in pricing from year to year, he would "have no idea" what Heartland would charge in 2013 based on the 2006 document. With regard to the January 2013 price quote to Sugar Camp Energy for a Godwin pump, Abbey testified that it was incomplete, and he had no idea of the current list price for the pump. Abbey also noted that copies of Heartland pricing guides were sometimes provided to Heartland customers to facilitate sales. He agreed that a price quote is confidential information due to the varying discounts offered, but that old price sheets would not be a factor in competitive pricing. Further, pump pricing information was generally known in the industry, and customers would sometimes share competitor quote information. Abbey testified that the employee phone sheet was also for his reference when working from home, but that he knew certain phone numbers without having to refer to it. He testified that he never shared or used any of the documents on his home computer on behalf of C and C.

¶ 19 On February 18, 2014, the court entered an order stating that it had "reviewed [the] pleadings, testimony, exhibits, and considered the applicable law, facts and arguments" and found that (1) the plaintiffs failed to prove that they possessed a clearly ascertainable right in need of protection, (2) they failed to prove that there is an inadequate remedy at law, and (3) they failed to prove that they have a likelihood of success on the merits of the case. The trial court denied the motion for preliminary injunction. The plaintiffs appeal.

¶ 20 A party seeking a preliminary injunction must show (1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no

adequate remedy at law, and (4) a likelihood of success on the merits of the case. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006). The party seeking the injunction must raise a fair question as to each element required to obtain the injunction. *Clinton Landfill, Inc. v. Mahomet Valley Water Authority*, 406 Ill. App. 3d 374, 378 (2010). Based on the evidence before us, we find that the trial court did not abuse its discretion in finding that the plaintiffs' claims fail to raise a fair question of the existence of a protectable right or of a likelihood of success on the merits for the purpose of receiving a preliminary injunction against the defendants. Thus, we will not discuss whether the plaintiffs have established the remaining grounds required for their requested relief.

¶ 21 A preliminary injunction is an extraordinary remedy and should be granted only in situations of extreme emergency or where serious harm would result if the preliminary injunction were not issued, and we review the trial court's decision for an abuse of discretion. *Id.* An abuse of discretion occurs when we find no evidence in the record supporting the trial court's ruling. *In re Marriage of Breitenfeldt*, 362 Ill. App. 3d 668, 674 (2005).

¶ 22 The plaintiffs contend that the trial court erred in finding that Heartland had failed to prove a clearly ascertainable right in need of protection and a likelihood of success on the merits, as the evidence presented at the hearing raised a fair question that the defendants (1) made false and misleading statements that disparaged the plaintiffs' goods and services, thus presenting a common-law commercial disparagement claim and a violation of the Illinois Uniform Deceptive Trade Practices Act (815 ILCS 510/1 *et seq.*

(West 2012)), (2) breached their fiduciary duty to Heartland by making such statements, (3) breached a contract with Heartland by violating the terms of the bonus letter agreement, and (4) retained confidential pricing information in violation of the Illinois Trade Secrets Act. (765 ILCS 1065/1 *et seq.* (West 2012)).

¶ 23 We first address the plaintiffs' argument that the defendants' statements to customers and suppliers were false, misleading, and demeaned the quality of their goods. To state a common law action for commercial disparagement or an action for violation of the Illinois Uniform Deceptive Trade Practices Act, Heartland must show that the defendants made false or misleading statements of fact regarding the quality of the plaintiffs' goods and services (*Barry Harlem Corp. v. Kraff*, 273 Ill App. 3d 388, 396 (1995)) or that Heartland engaged in "any other conduct which similarly created a likelihood of confusion or misunderstanding." 815 ILCS 510/2(a)(12) (West 2012). However, statements of opinion cannot form the basis for a commercial disparagement claim. *Soderlund Brothers, Inc. v. Carrier Corp*., 278 Ill. App. 3d 606, 620 (1995) (holding that the defendants' statements were "opinions, interpretations and conclusions" derived from an evaluation of the plaintiff's bid submission, and were therefore insufficient to support the plaintiff's claim).

¶ 24 Here, the defendants argue that Rahlfs's statements regarding Heartland, that it was "going in a different direction" and no longer focusing on its full-service orientation in favor of the sale and rental of Godwin pumps, was a personal interpretation of conversations with Albaugh and a Godwin corporate trainer, in conjunction with his previous employment with a Godwin-owned company. While the plaintiffs emphasize

that Rahlfs was never told any such thing by Heartland, we find this only further supports the defendants' contention that Rahlfs's statements were opinions rather than false statements of fact.

¶ 25 Further, while disparagement of a competitor's goods and services "in the proper circumstances" may justify injunctive relief, the plaintiff must establish repeated defamatory remarks by the defendant which create a real threat of future disparagements. See *Allcare, Inc. v. Bork*, 176 Ill. App. 3d 993, 1001 (1988) (finding that the plaintiff's complaint failed to demonstrate the need for injunctive relief where he did not allege any facts from which the threat of future defamations or disparagements may reasonably be assumed). Given that Szablewski testified that he never commented to any of his customers that Heartland was "getting out of the service business," and Rahlfs testified that he has corrected his misstatements to some customers, the defendants are no longer disseminating any such remarks to industry customers and suppliers. Because defendants' statements could be construed as opinions deduced from conversations with Heartland representatives and from their industry experience, and the plaintiffs do not allege nor does there appear to be a threat of future disparagements, we cannot say the trial court abused its discretion in its finding on this claim.

¶ 26 The plaintiffs next contend that the defendants' statements to customers and suppliers while still employed by Heartland breached their fiduciary duty to their employer. An employee has a common law fiduciary duty of loyalty to his employer; however, absent a restrictive covenant, former employees have a recognized right to compete with their former employer and solicit former customers so long as they do not

do so before termination of their employment, and may even go so far as to plan and outfit a competing corporation so long as they do not commence competition. *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 160, 183 (1993); *Cross Wood Products, Inc. v. Suter*, 97 Ill. App. 3d 282, 285 (1981). As neither Szablewski nor Rahlfs was bound by a restrictive covenant prohibiting competition with Heartland or from soliciting Heartland's customers, we cannot say that the trial court abused its discretion with regard to the proffered evidence on this claim. The plaintiffs contend that the defendants' May 2012 conversations with customers and suppliers actively exploited their employment with Heartland to obtain business for C and C. First, we note that to "actively exploit" a position for personal benefit is a reference to the heightened duty of loyalty owed by corporate officers,[2] not ordinary employees such as Szablewski and Rahlfs. The defendants' testimony reflects that the conversations asked customers and suppliers what they "thought" about the forming of C and C, and no evidence offered by the plaintiffs reflects that the defendants, as C and C, actually solicited any business or sold goods and services to Heartland customers before terminating their employment and commencing C and C's operations. While the defendants agreed that those conversations were intended

[2]Corporate officers owe a fiduciary duty of loyalty to their employer not to (1) actively exploit their positions within the corporation for their own personal benefit, or (2) hinder the ability of a corporation to continue the business for which it was developed. *Cooper Linse Hallman Capital Management, Inc. v. Hallman*, 368 Ill. App. 3d 353, 357 (2006).

to persuade Heartland's customers and suppliers to eventually do business with C and C, such preliminary actions do not rise to the level of a breach of an ordinary employee's duty of loyalty. Therefore, adequate evidence supports the trial court's finding on this claim.

¶ 27 We next address the question of whether it was an abuse of discretion for the trial court to deny the plaintiffs' request for injunctive relief with regards to Szablewski's alleged violation of his contractual agreement. The question of whether injunctive relief should issue to enforce a restrictive covenant depends on the validity of the covenant, which is a question of law. *Mohanty*, 225 Ill. 2d at 63. However, we need not discuss the validity of the agreement itself, as even if it were found to be valid and enforceable, sufficient evidence supports the defendants' argument that Szablewski did not breach the terms of the agreement.

¶ 28 Generally, agreements prohibiting solicitation of employees that are reasonably calculated to protect the employer's interest in maintaining a stable work force are enforceable under Illinois law. *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 76 (1992). The plaintiffs argue that Szablewski, by soliciting and hiring nonclerical Heartland employees, breached his bonus letter agreement with Heartland. The defendants respond that all the former Heartland employees hired by C and C are excluded by the terms of the agreement, being either clerical employees or nonclerical employees who responded to a nontargeted advertisement. Here, the plaintiffs concede that Zainitzer and Riggs were clerical employees, and the defendants' evidence demonstrates that Kinney, Krelo, and Rauch were employed following their response to C and C's newspaper

advertisement seeking pump repair mechanics and HDPE pipe fusion technicians. By the express terms of the agreement, then, C and C's hiring of these five former Heartland employees was permissible. Thus, we must decide the categorization of inside salespeople Abbey and Gibson as "clerical" or "non-clerical." Again, we find that evidence exists to support the trial court's ultimate determination. Unless the contract clearly defines its terms, the court must give the language its common and generally accepted meaning. *Dean Management, Inc. v. TBS Construction, Inc.*, 339 Ill. App. 3d 263, 269 (2003). "Clerical" is defined as "of or relating to an office worker or clerk"; "clerk" is defined as "one employed to keep records or accounts or to perform general office work." Merriam Webster Online Dictionary, http://www.merriamwebster.com/dictionary/clerical;webster.com/dictionary/clerk. Albaugh testified that Abbey and Gibson were valued for their technical knowledge and not their clerical skills; however, based on Abbey's testimony regarding his duties, we find that categorizing a Heartland inside salesperson's work as "clerical" is a perfectly appropriate description. We also note that courts strictly construe and interpret restrictive covenants, and any doubts or ambiguities must be resolved against the restrictions. *Northwest Podiatry Center, Ltd. v. Ochwat*, 2013 IL App (1st) 120458, ¶ 38. We therefore agree with the trial court that the plaintiffs fail to meet their burden on this claim, as well.

¶ 29 Finally, we hold that the trial court did not abuse its discretion in finding that the plaintiffs do not have a protectable interest in trade secrets. Under Illinois law, an employer's trade secrets are a protectable interest. *Liebert Corp. v. Mazur*, 357 Ill. App. 3d 265, 276 (2005). The plaintiffs allege protectable interests in the Heartland

documents produced from Abbey's home computer. In particular, they allege a protectable interest in their 2006 rental pricing information and the incomplete 2013 Heartland bid to Sugar Camp Energy. The Illinois Trade Secrets Act defines "trade secret" as:

> "information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers that:
>
> (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality." 765 ILCS 1065/2(d) (West 2012).

In examining these claims, courts consider (1) the extent to which the information is known outside the plaintiff's business, (2) the extent to which it is known by employees and others involved in the plaintiff's business, (3) the measures taken by the plaintiff to guard the confidentiality of the information, (4) the value of the information to the plaintiff's business and to its competitors, (5) the time, money, and effort extended by the plaintiff in developing the information, and (6) the ease or difficultly of others acquiring the information. *Liebert*, 357 Ill. App. 3d at 277.

¶ 30 Information generally known or understood within an industry, even if not known to the public at large, does not qualify as a trade secret. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 1090-91 (2007). As to the 2006 rental

pricing guide, Abbey testified that a seven-year-old pricing guide offers no insight to current prices charged by Heartland, and Heartland pricing guides were sometimes given to customers to facilitate sales. Additionally, Szablewski testified that pump pricing information was generally known in the industry. We think this testimony sufficiently demonstrates that the pricing guide at issue does not meet the definition of a trade secret.

¶ 31 While the incomplete January 2013 Heartland bid to Sugar Camp Energy presents a closer question, we nevertheless find that there is evidence supporting the trial court's determination. In order to prove that a pricing formula constitutes a trade secret, a plaintiff must establish that the value of the formula lies in the fact that it is not generally known to others who could benefit by using it or that it could not be acquired through general skills and knowledge. *Delta Medical Systems v. Mid-America Medical Systems, Inc.*, 331 Ill. App. 3d 777, 792 (2002). An employee must be entitled to utilize the general knowledge and skills acquired through experience, and where information can be readily duplicated without considerable time, effort, or expense, it is not a trade secret. *Stenstrom Petroleum*, 375 Ill. App. 3d at 1091. Szablewski testified that Sugar Camp Energy had, on at least one occasion, provided a competing sales company quote to him for the purpose of creating his own bid, and was actually "something you see quite a bit." Though Heartland bids are marked "confidential," Heartland nevertheless cannot stop its customers from sharing its bid information. Thus, even if the incomplete bid did give insight into Heartland's pricing formula, Szablewski could readily discover the information using his knowledge of industry pump prices and his contacts at Sugar Camp Energy. Again, we find that the trial court did not abuse its discretion in determining that

the plaintiffs do not have a protectable interest in trade secrets allegedly misappropriated by the defendants.

¶ 32 For the reasons given in the preceding discussion, we affirm the trial court's denial of the plaintiffs' motion for a preliminary injunction.

¶ 33 Affirmed.