

12-101-13

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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT
CIVIL ACTION
NO. 2011-962

C.R.T.R., Inc.,
Plaintiff

vs.

JIMMY LAO & others,¹
Defendants

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT

INTRODUCTION

The plaintiff has filed a three count complaint seeking injunctive relief (Count I) and damages for the defendants' misappropriation of the plaintiff's trade secrets (Count II) and violation of G.L. c. 93A (Count III). Before the Court is the defendant's motion for Summary Judgment. For the reasons set forth below, the motion is **ALLOWED**.

BACKGROUND

The summary judgment record reveals the following. CRTR is a recycling company whose business includes the recycling of nonfunctioning electronics ("e-waste"). Peter Kopcyh ("Kopcyh") manages and directs CRTR. Around 2007, Jimmy Lao ("Jimmy") became one of approximately twenty buyers of CRTR's e-waste. Jimmy purchased e-waste from CRTR and resold it to buyers in Asia. At some point, CRTR began negotiating with Jimmy to have him acquire CRTR, and the parties eventually entered into a Memorandum of Understanding ("MOU"). They signed the MOU in early 2008.

¹Kenneth Lao, Honour Crown Asia, Inc.

In February 2009, Kenneth Lao ("Kenneth") began working at CRTR as an independent contractor. Kenneth, who is Jimmy's nephew, also worked for Honour Crown Asia at this time. One of Kenneth's job functions was to assist in the running of CRTR. CRTR did not require Kenneth to sign a confidentiality agreement.

On August 1, 2011, Jimmy's lawyer sent a c. 93A demand letter to CRTR alleging that it had breached the terms of the MOU by not providing Jimmy with the agreed upon discount when he purchased e-waste. Thereafter, on August 11, 2011, Kenneth resigned from his employment at CRTR. On August 17th, CRTR filed its complaint against the defendants alleging misappropriation of trade secrets and confidential information against all defendants, alleging a violation of c. 93A against Honour Crown and Jimmy, and seeking injunctive relief as to the defendants use of CRTR's confidential information. With the filing of the lawsuit, CRTR brought a motion for a preliminary injunction requiring Kenneth to return all CRTR documents in his possession. Brockton Police seized Kenneth's laptop, and Kenneth's counsel delivered to CRTR three boxes of documents on September 14, 2011. CRTR alleges that Kenneth has failed to send CRTR-related emails to CRTR.

In Kopcych's deposition, he testified that Kenneth and Jimmy misappropriated confidential information, including customer names, (Ex. C at 112), prices (Id. at 118), information about CRTR's business relationship with another company, P.C. Trading (Id. at 121), and accounting records (Ex. G at 5).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and responses to requests for admissions under Rule 36, together with the affidavits . . . show that there is no genuine issue of material fact and that the moving party is

entitled to judgment as a matter of law." Mass.R. Civ. P. 56 (c); *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989); *Cassesso v. Commissioner of Corrections*, 390 Mass. 419, 422 (1983).

The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as matter of law. *Pederson*, 404 Mass. at 16-17. The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party will not reasonably be able to prove an essential element of his case. *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact for trial. Mass.R.Civ.P. 56(e); *Pederson*, 404 Mass. at 17. The opposing party may not rest on the allegations of the pleadings, or rely on "bare assertions and conclusions regarding [his] understandings, beliefs, and assumptions." *Polaroid Corp. v. Rollins Environmental Services (NJ), Inc.*, 416 Mass. 684, 696 (1993). Mere contradictions of factual allegations, without evidentiary support, are insufficient to raise questions of material fact sufficient to defeat a summary judgment motion. See *Madsen v. Erwin*, 395 Mass. 715, 721 (1985). The opposing party's obligation, rather, is to demonstrate the existence of admissible evidence sufficient to meet the burden of proof on the issues raised by the motion. The court reviews the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. *Attorney Gen. v. Bailey*, 386 Mass. 367, 370-71 (1982).

DISCUSSION

I. Misappropriation of Trade Secrets

General Laws c. 93, §42 provides that “[w]hoever embezzles, steals or unlawfully takes, carries away, conceals, or copies, or by fraud or by deception obtains, from any person or corporation, with intent to convert to his own use, any trade secret, regardless of value, shall be liable in tort to such person or corporation for all damages resulting therefrom.” A trade secret includes “anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences, or records a secret scientific, technical, merchandising production or management information, design, process, procedure, formula, invention or improvement.” G. L. c. 266, § 30. In order for a plaintiff to prevail on a count of misappropriation of trade secrets at summary judgment, it must demonstrate 1) that the information is a trade secret, 2) reasonable steps were taken to protect the information, and 3) the defendant used improper means, in breach of a confidential relationship, to misuse such information. *DB Riley Inc. v. AB Engineering Corp.*, 977 F. Supp. 84, 89-90 (D. Mass. 1997).

A. Existence of a Trade Secret

The defendants argue that CRTR has failed to provide evidence supporting any of the essential elements proving a misappropriation of trade secrets claim. First, the defendants contend that CRTR has not identified its alleged trade secrets with specificity, and therefore, cannot support its claim. See *Sutra, Inc. v. Iceland Express, EHF*, 2008 U.S. Dist. LEXIS 52849, *7 (D. Mass. July 7, 2008) (summary judgment allowed for defendant because plaintiff’s description of its alleged trade secret was overly broad and lacked specificity such that no reasonable jury could find that the plaintiff had placed an adequately described trade secret at issue). However, CRTR has identified a list of trade secrets it believes are at issue here. This list includes prices paid by CRTR and by its customers, amounts sold and purchased, billing

procedures, recordkeeping, customer lists, business processes and work flow patterns, document processing, process for determining fair market value and obtaining customers, and packaging and shipping methods. 2

Furthermore, CRTR has put forth sufficient evidence to create a dispute of fact over whether such information provides it a competitive advantage. *See Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340, 359 (D. Mass. 1993) (evidence that the information sought to be protected provided a competitive advantage supported that it was a trade secret). For example, in Kopcych's deposition, he explains that if a competitor knew of one of CRTR's clients and how much this client sold its e-waste to CRTR for, it could offer a better price to that client. (Ex. C at 118). Furthermore, CRTR has put forth evidence to suggest such information is not known to others outside its business. *See Dynamics Research Corp. v. Analytics Sciences Corp.*, 9 Mass. App. Ct. 254, 270 (1980) (a trade secret "must possess at least that modicum of originality which will separate it from everyday knowledge").

Thus, it is likely that there is a genuine issue of material fact as to whether any of the purportedly misappropriated information is a trade secret. *See Warner-Lambert Co. v. Execuquest Corp.*, 427 Mass. 46, 49 & n.5 (1998) (setting forth "six factors of relevant factual inquiry to determine whether information sought to be protected is, in fact and in law, confidential"); *Eastern Marble Prods. Corp. v. Roman Marble, Inc.*, 372 Mass. 835, 839 (1977) ("what is a trade secret depends in each case the conduct of the parties and the nature of the information") (internal quotations and citations omitted).

B. Protection of Alleged Trade Secrets

CRTR must also demonstrate that it took adequate steps to protect its trade secrets.

“One who claims that he has a trade secret must exercise eternal vigilance. This calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.” *J.T. Healy & Sons, Inc. v. James A Murphy & Son, Inc.*, 357 Mass. 728, 738 (1970); but see *USM Corp. v. Marson Fastener Corp.*, 379 Mass. 90, 101 (1979) (finding that courts “do not require the possessor of a trade secret to take heroic measures to preserve its secrecy”).

In deciding whether CRTR’s actions were sufficient to protect its secrets the court should consider four factors:

- (1) the existence or absence of an express agreement restricting disclosure;
- (2) the nature and extent of security precautions taken by the possessor to prevent acquisition of the information by unauthorized third parties;
- (3) the circumstance under which the information was disclosed . . . to the extent they give rise to a reasonable inference that further disclosure, without the consent of the possessor, is prohibited; and,
- (4) the degree to which the information has been placed in the public domain or rendered readily ascertainable. . . .

USM Corp., 379 Mass. at 98 (citations and quotations omitted).

Furthermore, “a court should consider the relationship and the conduct of the parties[,]” balancing plaintiff’s maintenance of its security measures against defendant’s improper conduct in obtaining the information. *Id.*

The defendants argue that CRTR did not take adequate steps to protect its secrets because it was aware that Kenneth worked for both Honour Crown and CRTR, and it never required any of the defendants to sign a confidentiality agreement. CRTR argues that depositions of two

employees (see Ex. R at 45 and Ex. Y at 59) demonstrate that CRTR took measures to protect its interests.

Specifically, CRTR cites the depositions of its employees Melissa Herren (“Herren”) and Sandy Lang (“Lang”). Herren states that she knew the customer lists were confidential, though no one had ever told her so, and Lang states that on one occasion, she was told not to bring work out of the office. This is not adequate evidence that CRTR took any measures to protect its purported trade secrets. There is no evidence of a policy regarding confidential information. See *Woolley's Laundry, Inc. v. Silva*, 304 Mass. 383, 390 (1939) (“The unexpressed intentions of the plaintiff cannot bind the defendants.”); see also generally *USM Corp.*, 379 Mass. 90 (unexpressed rules or policy cannot be considered reasonable precautions in the protection of claimed trade secrets). It is undisputed that CRTR never required any of the defendants to sign a confidentiality agreement. Furthermore, Herren testified that the customer lists were available on the computer and that CRTR advertised certain contracts with cities and towns on its websites.

CRTR has provided no evidence that it took measures to protect its other purported trade secrets, such as its process for determining fair market value and obtaining customers, or its packaging and shipping methods. Accordingly because no genuine issue of material fact exists upon the record that CRTR took reasonable precautions to protect its trade secrets the Court allows summary judgment for the misappropriation of trade secrets claim.

II. 93A Claim

“A practice or act will be unfair under G. L. c. 93A, § 2, if it is (1) within the penumbra of a common law, statutory, or other established concept of unfairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to competitors or other business

people.” *Morrison v. Toys “R” Us, Inc.*, 441 Mass. 451, 457 (2004) (citations omitted). To the extent that CRTR’s c. 93A claim is based on its claim for misappropriation of trade secrets, it fails as a matter of law. CRTR has not presented any evidence that the defendants’ conduct was immoral, unethical, oppressive, or unscrupulous such that it supports a claim under c. 93A. CRTR argues that Kenneth Lao’s use of the email address “kenneth.lao.crtr@gmail.com” after his employment with CRTR ended constitutes misrepresentation but has not put forth any evidence in the record supporting this claim. See Mass. R. Civ. P. 56(e) (specific facts showing that there is a genuine issue for trial must be shown). Furthermore, the c. 93A claim is only against Honour Crown and Jimmy Lao. CRTR has not put forth any evidence or argued as to how either of these defendants violated c. 93A. See *id.*

ORDER

The defendants’ Motion for Summary Judgment is allowed on all counts.

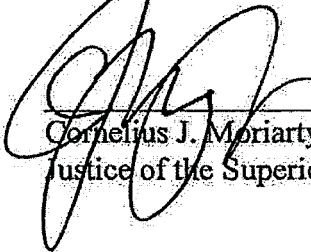
December 30, 2013

Entered 1/27/14

M/S CC: AAS/AP

SG

DH



Cornelius J. Moriarty II
Justice of the Superior Court