

STATE OF MICHIGAN
COURT OF APPEALS

FACILITY GROUP OF MICHIGAN, INC.,¹,

Plaintiff

and

TFG INSTALLATION SERVICES, INC.,

Plaintiff-Appellee,

v

OFFICE FURNITURE SERVICES, INC., and
MARK W. HAMMERLE,

Defendants-Appellees.

UNPUBLISHED
December 4, 2003

No. 241139
Wayne Circuit Court
LC No. 00-032439-CK

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendants, Office Furniture Services, Inc. (OFS) and Mark W. Hammerle, appeal as of right an order denying defendants' motion for attorney fees and costs under MCL 445.1905, in this action brought under the Uniform Trade Secrets Act, MCL 445.1901 *et seq.* We affirm.

I. FACTS

¹ Facility Group of Michigan, Inc., was originally named as a plaintiff in this suit because plaintiff's counsel mistakenly believed that Facility Group of Michigan, Inc., was the TFG Installation Services, Inc. (a foreign corporation) entity authorized to do business in Michigan. Upon realizing his mistake and upon TFG obtaining authority to transact business in the State of Michigan on February 15, 2001, TFG moved to amend the caption to show TFG Installation Services, Inc., as the only plaintiff in the case. The trial court granted TFG's motion on April 20, 2001.

In March 1999, Hammerle was hired as general manager for TFG in Charlotte, North Carolina. TGF expedites the delivery and installation of business furniture. In July 1999, Hammerle returned to Michigan, where he had previously worked in the furniture installation field, to open a TFG division in Detroit. Hammerle resigned from TFG in August 2000 and went to work for OFS.

On October 3, 2000, TFG filed suit against Hammerle and OFS alleging violation of the Uniform Trade Secrets Act, MCL 445.1901 *et seq.*, and tortious interference with contractual and business relations. In its complaint, TFG alleged that Hammerle met with representatives from OFS while employed at TFG and agreed to start employment with OFS and to use the following trade secrets for the benefit of OFS without the consent of TFG: 1) TFG's customer information; 2) information regarding the contact persons and the decision makers of TFG's customers; and, 3) TFG's method of operation and the systems and techniques used in TFG's business. TFG alleged that Hammerle disclosed these trade secrets to OFS upon commencement of his employment and this resulted in detriment to TFG.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that because the list of secrets supposedly appropriated by Hammerle were not, in fact, trade secrets, defendants were entitled to judgment as a matter of law with regard to TFG's claim that defendants violated the Uniform Trade Secrets Act.

TFG filed a response to defendants' motion for summary disposition and asserted that TFG provided Hammerle with training and access to confidential proprietary information and to trade secrets as defined by MCL 445.1902(d), such as:

- 1) preparing a job for performance, 2) billing a job, 3) the pricing structure used by TFG and actually pricing/quoting a job, 4) information regarding future projects, 5) information regarding customer internal operations, 6) information regarding customer contacts and decision makers, 7) information regarding TFG's existing customers and their existing clients.

TFG asserted that it made an effort to maintain the secrecy of the above listed information by presenting Hammerle with a non-competition/non-solicitation agreement although TFG acknowledged that Hammerle never signed the agreement. TFG pointed to the fact that OFS obtained three former clients of TFG after hiring Hammerle as raising a question of fact regarding whether Hammerle used this secret information to acquire this business for OFS. Finally, TFG argued that there was a question of fact regarding whether TFG's pricing information, customer contact information, and its method of operation constituted confidential trade secret information. TFG relied on an affidavit sworn by Tarr stating that Hammerle agreed to sign a non-competition/non-solicitation agreement as part of the proposal of employment, that Hammerle represented that he would sign it, and that Hammerle received, reviewed, and acknowledged an employee handbook which contained a confidentiality provision.

Defendants' motion for summary disposition was heard on June 22, 2001 and taken under advisement. Six days before the case was to go to trial, TFG filed a motion requesting that the court dismiss the case with prejudice due to TFG's inability to pay the costs associated with a trial. On September 24, 2001, the trial court dismissed the case with prejudice and further

ordered that defendants could file a motion for attorney fees and costs under MCL 445.1905 after the dismissal.

On January 28, 2002, defendants filed a motion requesting that the court award defendants attorney fees and costs in the amount of \$32,678.60 under MCL 445.1905 for the reason that TFG's claim against defendants for the misappropriation of trade secrets under the Uniform Trade Secrets Act was brought in bad faith. Defendants asserted that TFG's alleged trade secrets did not meet the definition of "trade secret" under MCL 445.1902(d), that TFG never made an effort to maintain the secrecy of the alleged trade secrets, and that TFG never presented evidence of a single act of misappropriation by defendants. Defendants further asserted that as they were the prevailing parties under MCR 2.625, they were entitled to attorney fees and costs under MCL 445.1905.²

TFG responded stating its claim for misappropriation was not filed or pursued in bad faith, but constituted a cognizable claim under the Uniform Trade Secrets Act, MCL 445.1901 *et seq.*, and that information regarding TFG's pricing, customer contacts and TFG's method of operation constituted trade secrets. TFG asserted that there was a serious question of impropriety on the part of Hammerle and that it would be reasonable to conclude that Hammerle fraudulently induced TFG to disclose confidential trade secret information by promising to sign the non-competition/non-solicitation agreement and by stating that he would abide by the confidential information provision in the employee handbook. TFG did put into place efforts to maintain the secrecy of its trade secrets by presenting Hammerle with a non-competition/non-solicitation agreement and by presenting an employment proposal to Hammerle which required that the agreement be signed as a condition of continued employment. Finally, TFG argued that evidence of misappropriation on the part of Hammerle and OFS is shown by the fact that OFS had obtained business from former TFG customers since Hammerle had been employed by OFS.

Defendants' motion was heard on March 22, 2002. The trial court found that while TFG's claim was not a strong claim, there was no bad faith on TFG's part. The trial court denied defendant's motion under MCL 445.1905 and MCR 2.625.

II. STANDARD OF REVIEW

The findings of fact underlying an award of attorney fees are reviewed for clear error, *Solution Source, Inc v LPR Associates Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474

² Defendants also called the court's attention to a motion to withdraw by TFG's counsel which was faxed to defendants on September 11, 2001, and which stated that one of the grounds for the motion to withdraw was that TFG "insists upon pursuing an objective that Petitioner considers repugnant or imprudent." Defendants strongly imply that this statement in the motion indicated that TFG's purported reason for moving to dismiss the case, financial hardship, was a disguise for the fact that the claim was without merit and that TFG filed it in bad faith. This motion was never filed or heard by the court. TFG's counsel stated in TFG's response brief that the course of conduct which counsel found repugnant was TFG's intention to continue the case until the date set for trial with no intention of proceeding to trial due to financial hardship.

(2002), and underlying issues of law are reviewed de novo, *HA Smith Lumber & Hardware Co v Decina*, ___ Mich App ___; ___ NW2d ___ (Docket No. 238521, issued 9/16/03), slip op, p 5. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Solution Source, supra* at 381-382. The decision whether to award attorney fees is within the trial court's discretion and will be reviewed on appeal for an abuse of discretion. *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003).

III. ANALYSIS

Attorney fees are recoverable under § 1905 of the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq.*:

If a claim of misappropriation is made in bad faith . . . the court may award reasonable attorney fees to the prevailing party.

Misappropriation is defined under the MUTSA as either of the following:

(i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.

(ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:

(A) Used improper means to acquire knowledge of the trade secret.

(B) At the time of the disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. [MCL 445.1902(b).]

Improper includes:

theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy or espionage through electronic or any other means. [MCL 445.1902(a).]

Trade secret is defined as:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) 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.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d).]

Here, the trial court denied defendants' motion for attorney fees after determining that plaintiff did not make its claim in bad faith. Our abuse of discretion standard of review is highly deferential. As stated by our Supreme Court in *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959):

The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

After a review of plaintiff's claim, we cannot conclude that the trial court erred in denying defendants' motion for attorney fees under MCL 445.1901. While we agree that plaintiff's claim may not have been strong, we do not find that the trial court's denial of attorney fees on the basis that it did not find that the claim was made in bad faith was grossly violative of fact and logic.

Affirmed.

/s/ Bill Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White