

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5214-09T3

BASELINE SERVICES, INC.,

Plaintiff-Respondent,

v.

DARREN J. KUTZ, CHROMATOGRAPHY
SOLUTIONS, INC., and JAMES NICOLUDIS,

Defendants-Appellants.

Argued March 15, 2011 - Decided August 25, 2011

Before Judges Espinosa and Skillman.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No. L-
004285-07.

Andrew M. Smith argued the cause for
appellants (Smith Marcino & Bowman,
attorneys; Mr. Smith, on the brief).

Andrew L. Indeck argued the cause for
respondent (Weber Gallagher Simpson Stapleton
Fires & Newby LLP, attorneys; Mr. Indeck, of
counsel; Jessica V. Henry, on the brief).

PER CURIAM

Plaintiff Baseline Services, Inc. filed a complaint against
two former employees, defendants Darren Kutz and James Nicoludis,
and a company started by Nicoludis, defendant Chromatography

Solutions, Inc., (CSI), alleging breach of the duty of loyalty, tortious interference with prospective economic advantage and tortious interference with a business relationship. Defendants Kutz and CSI presented no evidence at trial and now appeal from a judgment entered against them. For the reasons that follow, we affirm the judgment against Kutz and reverse the judgment entered against CSI.

Baseline provides customers with metrology services that include repair, maintenance and calibration of laboratory instrumentation by service engineers and technicians at the customer sites. Baseline had a series of annual service contracts with Global Pharmaceutical Sourcing Group (GPSG), a division of Johnson & Johnson, Inc., providing repair and calibration services for GPSG's high performance liquid chromatography equipment. From 2002 through 2006, Kutz and Nicoludis were the primary Baseline employees performing those services for GPSG. Nicoludis left Baseline in early 2006 and formed CSI, a company that would compete with Baseline, providing similar equipment support services.

In 2006, Baseline's contract with GPSG for such services was \$269,000.

Although satisfied with Baseline's services, GPSG solicited bids for the 2007 annual contract for calibration and repair

services as a cost-saving measure in the fall of 2006. Vincent Gelsomino, president of Baseline, acknowledged that the contract was put out to bid and that Baseline had no guarantee it would receive the 2007 contract.

Gelsomino prepared and calculated Baseline's bid of \$272,000 for the 2007 contract. In October 2006, he emailed the bid to Vincent Dilley, GPSG's lab specialist, and also gave a hard copy of the bid to Kutz for delivery to Dilley. The bid included a profit margin, which Gelsomino calculated to range from thirty-five to forty-five percent in GPSG contracts. Also in October 2006, CSI submitted a bid of \$241,000 for the 2007 contract.

Although cost was a primary consideration, GPSG was also concerned about the bidders' ability to provide adequate staffing, including on-site five-day coverage for the contract. Of the five bids received, Baseline and CSI were the only bidders to offer five-day coverage. Dilley prepared a summary of the information in the bids and provided it to lab managers and others involved in the evaluation process. In the summary, Dilley identified CSI as "a newly formed company by ex[-]Baseline employee . . . [that] hopes to hire 2 more staffs from Baseline to have a total of 3 at the start of our contract if selected." Although he testified he did not recall which technicians he was referring to or the source of this information, he agreed that

Kutz and Nicoludis were two of the "primary" people from Baseline who had serviced GPSG's account for Baseline. Even though he did not believe CSI had any employees at the time other than Nicoludis, Dilley recommended that the contract be awarded to CSI.

Emails among GPSG employees reflected a concern regarding CSI's ability to provide adequate staffing. Dave Thomas, a GPSG lab manager, questioned the accuracy of the information obtained from each vendor, stating, "CSI is cheapest with the most experience and covers all areas. However, if there are only 3 people in the company they might be stretched pretty thin, so we would need some assurance that they can respond and cover us adequately." An email from Maria Markovich, another lab manager, dated December 7, 2006, stated:

My understanding is that, with the two additional people drawn from Baseline, CSI will provide us with the same three service people that we've had all along -- and been satisfied with So with the least cost and considerable experience, CSI appears to be a very attractive option.

However -- I have some discomfort with engaging a company that doesn't have its employees in place yet. And I agree with Dave's comment regarding CSI's limited 3-person total staffing (and right now, it's a company of one!) Are we sure we can go back to Baseline if we first agree to engage CSI, but it isn't successful in staffing? No one else is offering a definitive 5 day coverage.

In an email dated December 8, 2006, Kerrie Heck, Director of Quality Stability Operations for GPSG, also questioned Dilley's data collection process, stating that the information "looked eerily tailored to CSI and hit the sell points that Darren [Kutz] was trying to pitch to me."

In her testimony, Heck explained her comment that the data seemed "eerily tailored toward CSI." Discussing Dilley's apparent bias in favor of CSI, Heck stated the lab had "a long standing relationship" with Kutz and that there was "a strong desire to continue to get service from [him] regardless of whether he was with Baseline or CSI." Other GPSG employees shared Heck's concern regarding Dilley's objectivity in presenting the information.

Heck also explained the reference to Kutz in her email. During the last quarter of 2006, Kutz was still an employee of Baseline performing services pursuant to its contract with GPSG. Kutz approached her as she was having lunch in the GPSG cafeteria and, although she did not recall "the specific details of the sales pitch," the conversation left her "with the impression he was selling CSI." She also recalled having knowledge that Kutz was planning to join CSI.

On January 2, 2007, Kutz met with Gelsomino, provided him with a letter of resignation, and advised him that he was leaving

to work for a competitor. Kutz further advised Gelsomino that GPSG had not awarded the contract to Baseline. Gelsomino attempted to contact Dilley and then called another GPSG lab manager who confirmed that CSI had obtained the contract. When Dilley returned Gelsomino's call, he left a message in which he stated, "you already know that Darren got the contract[.]"

On January 3, 2007, Kutz sent an email to Baseline employees in which he stated he was leaving Baseline to work for a competitor. He stated that, at the request of his new employer, he could not divulge its identity, explaining, "They are working on some contracts and they want to be able to go in and tell the customers that I now work for them and not Baseline any longer."

Following a bench trial, the trial judge dismissed all claims against Nicoludis. The court found Kutz liable to Baseline on all claims and CSI liable for tortious interference with prospective advantage and with a business relationship. The trial court accepted Gelsomino's testimony as to Baseline's historical net profit from GPSG contracts was a reasonable method of calculating damages and entered judgment in favor of Baseline against Kutz and CSI in the amount of \$47,600, which afforded Baseline an amount equal to a 17.5% profit on the contract it lost.

In this appeal, defendants Kutz and CSI argue that Baseline failed to meet its burden of proof regarding its claims and failed to prove any damages. These arguments call for us to review the factual findings of the trial court, a review of limited scope. Such findings are entitled to deference so long as they are supported by sufficient credible evidence. Real v. Radir Wheels, Inc., 198 N.J. 511, 527 n. 11 (2009); State v. Locurto, 157 N.J. 463, 471 (1999).

After carefully reviewing the record, briefs and arguments of counsel, we are satisfied that the evidence was sufficient to establish a breach of Kutz's duty of loyalty.

Loyalty from an employee to an employer consists of certain very basic and common sense obligations. An employee must not while employed act contrary to the employer's interest. And, during that period of employment, an employee has a duty not to compete with his or her employer.

[Lamorte Burns & Co. v. Walters, 167 N.J. 285, 302 (2001)(internal citations omitted)]

While an employee is not precluded from taking any action in preparation of a plan to compete with his employer, "he may not breach the undivided duty of loyalty he owes his employer while still employed, by soliciting his employer's customers or other acts of secret competition." Platinum Mgmt., Inc. v. Dahms, 285 N.J. Super. 274, 303 (Law Div. 1995).

The unrefuted evidence established that, while still employed by Baseline, Kutz actively solicited the 2007 GPSG contract for CSI, Baseline's competitor. It is also clear from the information contained in the GPSG emails and in the testimony provided by GPSG employees that Kutz's plan to defect to CSI was revealed to them and had the intended effect of "selling" CSI to them. The trial court's finding of liability on the breach of loyalty claim was, therefore, amply supported by the evidence.

In light of our conclusion, it is unnecessary for us to consider Kutz's liability on the tortious interference claims. We therefore turn to consider the sufficiency of the evidence against CSI on those claims.

An action for tortious interference requires proof of the following: (1) a protected interest; (2) malice, i.e., defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751 (1989); see also Lamorte, supra, 167 N.J. at 305-06; MacDougall v. Weichert, 144 N.J. 380, 403-04 (1996); Platinum Mgmt., supra, 285 N.J. Super. at 306. The tortious interference claims against CSI must fail because there was insufficient proof of the second of these elements, that CSI acted with malice.

In MacDougall, the Court stated that the nature of the actor's conduct, the actor's motive, the interests sought to be advanced by the actor and the social interest in protecting the freedom of action of the actor and the contractual interests of the other were most pertinent to the "malice standard." 144 N.J. at 404-05. Citing Restatement (Second) of Torts § 767B cmt. f, § 767 (1979), the Court observed that an actor's economic motive will "normally prevail" over that of another if the actor does not use wrongful means to achieve his goal. Id. at 405. To illustrate this point, the Court stated, "a threat to terminate ordinary business relations with an employer, . . . even though undertaken with malice, is not actionable unless it is 'for a reason not reasonably related to the protection of a legitimate business interest of the actor.'" Ibid. (citation omitted). "The line clearly is drawn at conduct that is fraudulent, dishonest, or illegal. . . ." Lamorte, supra, 167 N.J. at 307.

Throughout 2006, CSI consisted of one person, defendant Nicoludis. The court dismissed all claims against him, a decision that Baseline has not appealed. As the trial court noted, there were "no proofs of coordination between Mr. Kutz, Mr. Nicoludis and CSI in developing CSI's bid for the 2007 contract[.]" CSI had a legitimate business interest in competing with Baseline and securing the GPSG contract. The record is

devoid of any evidence that CSI used any wrongful means to achieve that legitimate business interest. See e.g., Longo v. Reilly, 35 N.J. Super. 405, 412 (App. Div. 1955), certif. denied, 25 N.J. 45 (1957) (defendants' alteration of votes to thwart plaintiff's election bid for office of union secretary actionable); Mayflower Indus. v. Thor Corp., 15 N.J. Super. 337, 339 (Ch. Div. 1951), aff'd, 9 N.J. 605 (1952) (defendant's groundless threats of litigation actionable). Because there is inadequate support in the record to support a finding of actionable malice by CSI, we reverse the judgment entered against CSI.

Finally, defendants argue that Baseline failed to prove any damages. As noted, the proof consisted entirely of Gelosomino's testimony regarding the profit margin for GPSG contracts. "Proof of damages need not be done with exactitude It is . . . sufficient that the plaintiff prove damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate." Lane v. Oil Delivery, 216 N.J. Super. 413, 420 (App. Div. 1987); see also Totaro, Duffy, Cannova and Co., L.L.C. v. Lane, Middleton & Co., L.L.C., 191 N.J. 1, 14 (2007). Such foundation must "not be a matter of speculation and the witness must be required to establish the grounds for any opinion given."

Lane, supra, 216 N.J. at 420; see also Penbara v. Straczynski, 347 N.J. Super. 155, 162 (App. Div. 2002).

As the owner of Baseline, Gelosomino was familiar with the history of contracts with GPSG. He prepared the 2007 bid based upon that history, including the profit margin built into those contracts. His testimony therefore provided the requisite foundation for a lay opinion regarding the profit lost when the GPSG contract was awarded to CSI, see State v. McLean, 205 N.J. 438, 457-58 (2011), sufficient to enable the trial judge to make a fair and reasonable estimate of the damages.

We therefore affirm the judgment against Kutz and reverse the judgment entered against CSI.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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