FORM 4

JUDGMENT IN A CIVIL CASE

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SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2012CP4006998

Alliance Consulting Engineers Inc
PLAINTIFF(S)

Caleb P Pozsik
Mead & Hunt, Inc.
DEFENDANT(S)

Submitted by: _____ | **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : This order ends the case as to Defendant Mead & Hunt, Inc.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Carl Lee Lee **Judge Code** _____ **Date** 1/29/2015

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____ 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 4th day of Feb, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

David Eugene Dubberly | James Edward Bradley | Richard J. Morgan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Alliance Consulting Engineers, Inc., Plaintiff, v. Caleb P. Pozsik and Mead & Hunt, Inc., Defendants.	C.A. No.: 2012-CP-40-06998 **ORDER ON SUMMARY JUDGMENT AS TO MEAD & HUNT**

This matter comes before me on several motions by the parties. This Order addresses only the issues raised by Defendant Mead & Hunt, Inc. ("Mead & Hunt") for summary judgment and the motion by Plaintiff Alliance Consulting Engineers, Inc. ("Alliance") for partial summary judgment against Mead & Hunt.

PROCEDURAL BACKGROUND

On October 16, 2012, Alliance filed a Complaint alleging numerous causes of action against its former employee, Caleb P. Pozsik ("Pozsik"), and his current employer, Mead & Hunt, Inc. Alliance alleged that Pozsik breached his contract with Alliance; Pozsik breached the Implied Duty of Good Faith and Fair Dealing; Pozsik Breached his Contract accompanied by a Fraudulent Act; Pozsik and Mead & Hunt violated the South Carolina Trade Secrets Act; Pozsik and Mead & Hunt violated the South Carolina Unfair Trade Practices Act; Pozsik breached his Duty of Loyalty; Pozsik and Mead & Hunt converted Alliance property; Mead & Hunt Tortiously Interfered with Actual Contract Relations; Pozsik and Mead & Hunt Tortiously Interfered with Prospective Contractual Relations; and Pozsik and Mead & Hunt engaged in a Conspiracy.

Alliance also filed a Motion for a Temporary Injunction on that date. The Court entered an Order on October 16, 2012 granting Alliance's ex parte motion for a Temporary Restraining Order and thereafter on October 19, 2012 entered a Consent Preliminary Injunction against Pozsik and Mead & Hunt.

The parties completed their discovery. On December 17, 2013, Mead & Hunt filed a Motion for Summary Judgment on all claims that Alliance filed against it. Thereafter on December 31, 2013, Alliance filed a Partial Summary Judgment Motion on the following claims: Breach of Contract against Pozsik; Breach of the Implied Duty of Good Faith and Fair Dealing against Pozsik;

Violation of the South Carolina Trade Secrets Act against Pozsik and Mead & Hunt; and Conversion against Pozsik and Mead & Hunt. Separately against Pozsik, Alliance filed a contempt motion on a spoliation issue. On January 21, 2014, Pozsik filed a summary judgment motion along with a contempt motion against Alliance based on the failure of its designated Rule 30(b)(6) witnesses to testify as to damages as properly noticed. By separate Order dated January 13, 2015, the motion for contempt on the spoliation issue and the motion for sanctions regarding the testimony about damages by the Rule 30(b)(6) witness were decided.

Prior to the hearing of this matter, Alliance proposed to dismiss all causes of action against the Defendants except the breach of contract, breach of implied duty of good faith and fair dealing, and breach of duty of loyalty against Pozsik; and the violation of the South Carolina Trade Secrets Act and Conversion against both defendants. A Stipulation of Dismissal with Prejudice was filed on February 4, 2014 dismissing the claims of Breach of Contract with Fraudulent Intent, Violation of the Unfair Trade Practices Act, Tortious Interference with Contract, Tortious Interference with Prospective Contract, and Civil Conspiracy.

The Court heard argument on the respective Motions for Summary Judgment on February 10, 2014. Based on the pleadings, discovery, argument of counsel and other documents before it, this Court grants Mead & Hunt's motion for summary judgment and therefore denies Alliance's motion for partial summary judgment against Mead & Hunt.

FACTUAL BACKGROUND

Based upon the pleadings; depositions of Pozsik, Deepal Eliatamby, Wendy Culver, Jeffrey Burkett, and Brittany Williams; Exhibits to all of the Depositions; Affidavits of Eliatamby and Pozsik; and discovery responses, the relevant facts are cited below.

Alliance is a Columbia-based engineering and consulting firm. A critical component of Alliance's commercial strategy is its focus on comprehensive "site development," offering clients an integrated, hands-on approach to engineering projects that guides clients through conceptual planning, design, permitting, and finally construction.

Pozsik worked as an engineering associate for Alliance from on or about August 9, 2007 until on or about March 24, 2010. At the beginning of his employment with Alliance, Pozsik signed a Confidentiality and Non-Competition Agreement setting forth his obligations both during and after his employment ("the Agreement"). By signing the Agreement, Pozsik acknowledged and agreed that, in connection with his work for Alliance, he would have access to

confidential and proprietary information, and that he was contractually prohibited from using or disclosing that confidential information both during and after his employment. Specifically, Pozsik agreed:

> In consideration of Employment at Alliance and other good and valuable consideration provided to Employee by Alliance (the value of which is acknowledged by Employee), as well as other confidential or proprietary information that Alliance may provide during the course of Employee's employment, Employee agrees to the following:
>
> Employee will not disclose, reveal, or otherwise publish confidential or proprietary information provided by Alliance to Employee at any time during or after leaving Alliance for any reason.

See Pozsik Depo. Exh. 3.

On or about March 24, 2010, Pozsik's job with Plaintiff ended. He was still bound by the Agreement, particularly his continuing obligation to preserve the confidentiality of all proprietary information to which he had access while employed by Plaintiff; although he was, of course, free to search for other employment.

Pozsik was subsequently hired by one of Plaintiff's competitors, RPM Engineers, Inc. ("RPM"), in Lexington, South Carolina. In August 2010, Alliance believed that Pozsik violated the Agreement by soliciting a former co-worker to work for RPM. On September 2, 2010, through counsel, Alliance sent cease-and-desist letters to both Pozsik and RPM, reminding both of Pozsik's prohibition against soliciting Plaintiff's employees and his continuing obligation to maintain the confidentiality of any proprietary information to which he had access while employed by Plaintiff.

In response to Plaintiff's cease-and-desist letters, on or about September 8, 2010, a representative of RPM's management contacted counsel for Alliance and stated that neither Pozsik nor RPM had any confidential or proprietary information belonging to Plaintiff. The RPM representative confirmed his understanding that Pozsik was contractually bound to preserve the confidentiality of Alliance's proprietary information and that the use or disclosure of that information was strictly prohibited. Alliance considered the matter closed. Pozsik did not recall any conversations with anyone at RPM about the letters and was unaware of RPM taking any action in response to the letters.

On or about January 1, 2011, RPM was acquired by Mead & Hunt. As a result of the merger, Pozsik became employed with Mead & Hunt in construction services at the location of the former RPM in Lexington, South Carolina.

On October 9, 2012, Pozsik sent a series of electronic text messages to one of Plaintiff's employees using the cell phone issued to him by Mead & Hunt while he was at work. Pozsik's messages indicated that prior to leaving his employment with Alliance, he downloaded proposals and other documents of Alliance, including at least two specific technical proposals, one of which was the Clarendon County Industrial Park site certification proposal. Pozsik indicated that he stored those proposals and other information obtained from Plaintiff on his personal, external hard drive. Pozsik asked Plaintiff's employee to "smuggle" additional copies of the proposals from Plaintiff's internal network and give them to him because his external hard drive was no longer working.

Pozsik testified that he wanted the proposals because he was "particularly fond" of the style and content of Alliance's proposals, and that he was interested in Alliance's content regarding South Carolina Department of Commerce requirements for site certifications. Pozsik further testified that he sent the final text message, "Don't worry about it dude. I don't want u to jeopardize anything. Or get caught. I feel kinda Sorry I asked," because he realized what he was asking was wrong and did not want to get himself or Alliance's employee in trouble.

Alliance asserts that Pozsik and Mead & Hunt wanted the proposal because one week later, on October 16, 2012, Mead & Hunt responded to a request for qualifications for a site certification project. In the document, Mead & Hunt was touting Pozsik's experience with site certification projects at Alliance and specifically mentioned Pozsik's experience with the Clarendon County Industrial Park project. That is the same project Pozsik mentioned in his October 9, 2012 text messages to Plaintiff's employee.

Despite the request by Pozsik for the proposals, he never received the information mentioned in his October 2012 text message from anyone at Alliance. Pozsik never used any information from Alliance on or for any work at Mead & Hunt. Pozsik testified the external hard drive, where documents from Alliance were stored, stopped working and he threw it away. Even if Pozsik's testimony regarding the external hard drive is not believed, it is undisputed that there is no evidence Pozsik used any information or documents from Alliance. Further, it is undisputed that Mead & Hunt did not have copies of any of the documents or excerpts from those

documents. During the written portion of the discovery in this case, Mead & Hunt provided to Alliance over ten thousand (10,000) pages of documents. In those documents, there is no evidence that Mead & Hunt possessed any Alliance information. Further, in those responses there is no evidence that Mead & Hunt ever "used" any Alliance information since it had none.

The evidence reveals that Pozsik acted alone in requesting documents from Alliance. No one at Mead & Hunt had any involvement with his text message of October 2012 or any attempt to obtain and use information from Alliance. Pozsik was not asked by anyone at Mead & Hunt to request or obtain the information. Pozsik was not directed to request, solicit, retrieve, or obtain the information or documents. No one at Mead & Hunt had any involvement in any manner with the activities of Pozsik regarding Alliance documents or information.

STANDARD OF REVIEW

Summary judgment is appropriate where, as here, the record demonstrates that "there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law." SCRCP 56(c). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co.,* 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009) (internal citations omitted). When the motion for summary judgment is supported by affidavits or deposition testimony, the "adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." SCRCP 56(e).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Gadson v. Hembree*, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Nelson v. Charleston Co. Parks & Recreation Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

The moving party has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Rule 56(c), SCRCP. Once the moving party carries its initial burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to

the material facts" but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Baughman v. Am. Telephone & Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citation omitted). The non-moving party must set forth facts, as "would be admissible in evidence," to show that a true jury issue exists. Rule 56(e), SCRCP. "Ultimate or conclusory facts and conclusions of law, as well as statements on 'information and belief' cannot be utilized on a summary judgment motion." *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) (quoting Charles Alan Wright et al., *Federal Practice and Procedure* § 2738 (3d ed. 2007)).

DISCUSSION

Considering the evidence in the light most favorable to the non-moving party, there is no evidence that Mead & Hunt violated the South Carolina Trade Secrets Act and no evidence that Mead & Hunt converted any property belonging to Alliance for its own use. There is no genuine issue of material fact and Mead & Hunt is entitled to judgment as a matter of law.

South Carolina Trade Secrets Act

The burden of proving the existence of a trade secret falls upon the Plaintiff. *Lowndes Prods., Inc., v. Brower*, 91 S.E.2d 761, 765 (1972). S.C. Code Ann. § 39-8-20 states that a trade secret is:

> (a) information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure or code that:
>
> (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, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy;
>
> (b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

S.C. Code Ann. § 39-8-20(5). The parties do not argue, in any fashion, in their motions for

summary judgment that the information requested and or possessed by Pozsik is not a trade secret. The evidence presented to the Court does not focus on whether the information is a trade secret under the statute, rather the depositions and exhibits focus on the misuse or misappropriation of the information. For purposes of this motion only, it is presumed that the information requested by Pozsik in his email constitutes a trade secret; therefore, this Court will focus on whether there was misuse or misappropriation of the information.

The statute thereafter defines "misappropriation" of a trade secret as:

> (a) acquisition of a trade secret of another by a person by improper means; or
> (b) 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; or
> (c) disclosure or use of a trade secret of another without express or implied consent by a person who:
> (i) used improper means to acquire knowledge of the trade secret; or
> (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
> (A) derived from or through a person who had utilized improper means to acquire it;
> (B) acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> (iii) before a material change in his 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.

S.C. Code Ann. § 39-8-20(2).

Mr. Eliatamby, the CEO of Alliance, testified that he had no facts or evidence that Mead & Hunt used any information or data or any other information belonging to Alliance. His belief, with nothing more, is insufficient to create a fact issue. *See Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996) (where seller of industrial cleaning equipment and supplies brought action against former employee for interference with contractual rights, misappropriation of trade secrets, and breach of contract, trial judge erred in failing to grant former employee's motions for directed verdict and judgment notwithstanding the verdict on the trade secrets cause of action **where there was no evidence that former employee used or disclosed any trade secret of employer** when former employee, six months after the expiration of the

noncompetition period, contacted some of employer's customers and sold products similar to those of former employer which were based on formulae that was readily available from suppliers of raw materials) (Emphasis added).

Plaintiff points to Pozsik's phone being provided by Mead & Hunt and that the text was sent during business hours while Pozsik was at Mead & Hunt as evidence that Mead & Hunt participated in the request. This is just speculation. The evidence shows that Mead & Hunt had no involvement in any attempt to obtain information from Alliance. Alliance also argues that Mead & Hunt wanted the information and intended to use it in a proposal due on October 16, 2012. Alliance refers to language in the proposal touting Pozsik's experience with site certification projects at Alliance, including his experience with the Clarendon County Industrial Park project. The discussion in the proposal is a portion of the marketing discussion of the qualification of Mead & Hunt's team. The paragraph that mentions Pozsik lists the Clarendon County project as well as others on which Pozsik worked as part of a team. Uncontroverted evidence reveals this information was based upon Pozsik's resume. While these are inferences Alliance wants to draw from the circumstances, these inferences lack a factual basis showing Mead & Hunt was involved in any misappropriation of trade secrets. The evidence is uncontroverted from the witnesses in a position to have actual knowledge that Mead & Hunt had no involvement with the text request; it did not possess or use any information that Pozsik had on the external hard drive; and that Pozsik had no involvement with the preparation of the October 16 proposal.

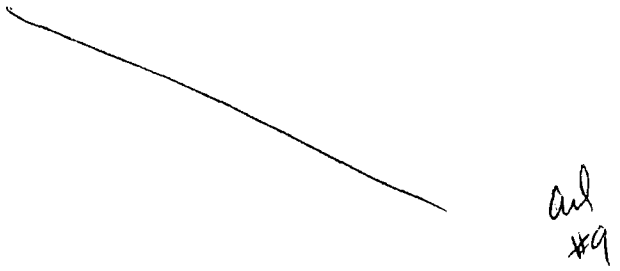
Moreover, Eliatamby testified without qualification that it never placed confidentiality notices on any of its materials disseminated to its clients which could become public. "If the person entitled to a trade secret wishes to have its exclusive use in his own business, he must not fail to take all proper and reasonable steps to keep it secret. He cannot lie back and do nothing to preserve its essential secret quality, particularly when the subject matter of the process becomes known to a number of individuals involved in its use.... This calls for constant warnings to all persons to whom the trade secret has become known...." *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (1972) (internal citation omitted). A trade secret owner who knowingly discloses proprietary information to others must also "obtain[] from each an agreement . . . acknowledging its secrecy and promising to respect it." *Id.* Alliance did take steps among the workplace to secure its information. Eliatamby described the process for securing access to all

documents and information on a project. However, he points to nothing in the record suggesting Alliance obtained a confidentiality agreement from the multiple entities to whom it submitted proposals or marked the documents as confidential or proprietary. Eliatamby acknowledges that an employee who gains skills during the time of employment would be able to use those skills in performance of duties with a future employer. South Carolina's statutory definition of a trade secret requires that the secret be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-20(5)(a)(ii).

The evidence reveals that there is no genuine issue of material fact on the violation of the S.C. Trade Secrets Act and therefore, Mead & Hunt is entitled to summary judgment on this claim.

Conversion

To recover in an action for conversion, the Plaintiff must prove: (1) an interest by the Plaintiff in the thing converted; (2) the defendant converted the property to his own use; and (3) the use was without the plaintiff's permission. *See Moseley v. Oswald,* 376 S.C. 251, 656 S.E.2d 380 (2008). The issue here is whether Mead & Hunt converted property of Alliance to its own use; i.e., the illegal use or misuse or illegal detention of another's property. As previously stated, there is absolutely no evidence that Mead & Hunt ever had any of Alliance's property. Eliatamby admitted he had no factual basis for his conclusion but only surmises or speculates that Mead & Hunt has Alliance's property. Speculation and supposition cannot formulate the basis for summary judgment. *See Rule 56(e), SCRCP* ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response ... must set forth *specific facts* showing there is a genuine issue for trial) (emphasis added). Without that predicate and required element, this claim against Mead & Hunt must fail.



ORDER

Based upon the foregoing, it is therefore **ORDERED** that Defendant Mead and Hunt's Motion for Summary Judgment is **GRANTED** and the remaining claims for violation of the S.C. Trade Secrets Act and Conversion are dismissed. Defendant Mead & Hunt, Inc. is dismissed from this action with prejudice. Plaintiff's Motion for Partial Summary Judgment against Mead & Hunt is **DENIED.**

AND IT IS SO ORDERED.

ALISON RENEE LEE
Circuit Court Judge

January 29, 2015
Columbia, South Carolina