

RECEIVED

MAR 27 2019

SC Court of Appeals

ELECTRONICALLY FILED - 2019 Mar 08 3:08 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

Formatted: Left: 72 pt, Right: 72 pt

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
Encore Technology Group, LLC,	)	C.A. No.: 2015-CP-23-05757
Plaintiff,	)	
v.	)	ORDER STAYING
Keone Trask and Clear Touch Interactive,	)	RECEIVERSHIP
Inc. f/k/a Clear Touch Interactive, LLC,	)	
Defendants.	)	

THIS MATTER, comes before the Court upon motion by Defendants Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC ("Clear Touch") (*collectively* "Defendants"), to dissolve the Receivership established under the Receiver Order entered July 23, 2018. A hearing was held February 7, 2019, at which counsel for all parties participated. After considering the matters of record, materials presented at the hearing, and arguments of counsel, the Court finds and concludes that it is appropriate to stay the Receivership upon the grounds and condition(s) specified below because the Defendants have paid the what appears to be entirety of the judgments against them into the Court. Nothing contained in this finding shall prohibit plaintiff from establishing that the judgments have not been paid in the entirety.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

A week-long trial was held in September 2017 with the jury rendering a verdict in favor of the Plaintiff on six of the eight causes of action alleged. The jury's verdict and findings under the Trade Secrets cause of action is of particular importance to the Motion before the Court. Encore alleged the Defendants misappropriated its trade secrets in violation of the South Carolina Trade Secrets Act (SCTSA). The jury found for the Plaintiff on its Trade Secrets claim and awarded

\$424,945 in actual damages against the Defendants. (Verdict Form p. 4). The jury went on to answer "Yes" to the special interrogatory on the Verdict Form asking "Was the Defendants' conduct in violating the South Carolina Trade Secrets Act committed by the Defendants in a willful, wanton, or reckless disregard of Plaintiff's rights?" *Id.* In light of the jury's response to this special interrogatory, the Court awarded Encore its attorney's fees and costs of \$440,500 and levied the maximum amount of exemplary damages allowed under the SCTSA against the Defendants of \$849,890; twice the actual damages awarded by the jury. That brought the Trade Secrets verdict against the Defendants to a total of \$1,715,335.00.

Following post-trial filings and arguments, this Court entered a Final Order and Judgment on April 2, 2018 in favor of the Plaintiff against Keone Trask individually and Defendant Clear Touch (the "Final Order"). Specifically, the Final Order awarded the following:

Against Defendant Keone Trask

<u>Actual Damages</u>	<u>Punitive Damages</u>	<u>Cause of Action</u>
\$ 375,733.40	\$ 175,000.00	Breach of Loyalty
675,361.00	1,500,000.00	Breach of Fiduciary Duty
424,945.00	849,890.00	Violation of Trade Secrets Act
<u>+1,476,039.00</u>	<u>+2,000,000.00</u>	Breach of Contract Accompanied by a Fraudulent Act
\$2,952,078.40	+ \$4,524,890.00	= \$7,476,968.40
Plus attorneys' fees		+ 345,600.00
Plus costs & expenses		+ 94,900.00
TOTAL JUDGMENT AGAINST TRASK:		<u>\$7,917,468.40</u>

Against Defendant Clear Touch Interactive, Inc.

<u>Actual Damages</u>	<u>Punitive Damages</u>	<u>Cause of Action</u>
\$ 424,945.00	849,890.00	Violation of Trade Secrets Act
or		
<u>424,945.00</u>	<u>500,000.00</u>	Tortious Interference

\$ 424,945.00	+	\$ 849,890.00 =	\$1,274,835.00
Plus attorneys' fees			+ 345,600.00
Plus costs & expenses			+ 94,900.00
TOTAL JUDGMENT AGAINST Clear Touch:			<u>\$1,715,335.00</u>

The Final Order awarded Encore recovery under the Trade Secrets Act cause of action against Clear Touch, as the higher total judgment awarded against the corporate Defendant when compared with the Tortious Interference award. Thus, the Trade Secrets award of \$1,715,335.00 comprised the entire judgment against Clear Touch and a notable portion of the judgment against Keone Trask.

The Final Order granted Defendants' Motion to pay the respective judgments against them into the Court under Rule 67 pending resolution of any appeal. By April 17, 2018, Clear Touch paid the judgment against it in full into the Court under Rule 67.

Defendants filed a timely notice of appeal of the Final Order in July 2019. The judgment against Keone Trask remained outstanding at that time. Encore filed a Motion for Appointment of a Receiver on May 21, 2018 as part of its efforts to collect the Trask judgment. The Court granted Encore's motion and entered a Receiver Order on July 23, 2018 for the purpose of identifying and taking possession of Keone Trask's assets to secure the outstanding judgment against him pending resolution of the appeal. The Receiver began his job in earnest shortly thereafter.

Defendants filed two subsequent appeals, one of the Receiver Order and another arising out of the dismissal of a separate action between the Parties, all of which were consolidated into Appellate Case No. 2018-001444. That matter is currently pending before the Court of Appeals.

On January 3, 2019, Keone Trask paid the outstanding judgment balance against him into the Court under Rule 67, thus fully depositing the entirety of Encore's judgment against both Defendants into the Court. The payments of April 17, 2018 and January 3, 2019 total

\$8,316,104.58 and are meant to fully secure Encore's respective judgments against the Defendants pending resolution of the consolidated appeal arising out of and related to this matter.

On January 8, 2019, Defendants filed a Motion to Dissolve the Receivership because their payments into the Court, and more specifically Keone Trask's January 3, 2019 payment of the judgment against him to the Clerk, eliminated the need for the Receiver. Encore opposed the Motion, claiming that Defendants' miscalculated the judgment amount owed by Trask and asserting he was responsible for an additional \$1.2 million dollars because it claimed each Defendant owed \$849,890 in exemplary damages on the Trade Secrets awards, plus post-judgment interest.

A February 7, 2019 hearing was held on Defendants' Motion to Dissolve the Receiver, along with several related motions.

LAW AND ANALYSIS

Defendants contend that Clear Touch's April 17, 2018 and Keone Trask's January 3, 2019 payments into the Court fully secure the outstanding judgments owed to Encore under the Final Order thereby eliminating the need for the Receiver. Encore opposes the Motion by arguing Defendants' miscalculated the judgment amount owed by Trask and claiming that he is responsible for an additional \$1.2 million dollars. That alleged shortfall is comprised of three items; (1) \$849,890 in exemplary damages under the Trade Secret claim (which Encore calculated to total \$904,515.38 with post-judgment interest as of February 7, 2019) that Encore argues Trask owes despite Clear Touch's payment of the Trade Secret verdict into the Court; (2) the Receiver's fees and costs incurred to date; and (3) the fees and costs charged by Encore's counsel it attributes to post-judgment collection efforts. On the latter point, the Court notes that while the fees and costs

charged by Encore's counsel may ultimately be recoverable from Defendants, the Court declines to require that they be deposited with the Receiver at this time.

At the hearing, Encore admitted that if the Plaintiff can recover exemplary damages on the Trade Secrets awards from only one Defendant, and the Receiver fees and costs and its post-judgment attorney's fees and costs are not included in calculating the judgment against Trask, then the Defendants have paid the judgments against them in full into the Court. Encore recognized that if the Court rejects its arguments, then the Defendants have paid the entirety of the judgments against them into the Court as of January 3, 2019.

The Court finds that, because it can recover the \$849,890 in exemplary damages under the Trade Secrets Act from only one Defendant, Encore is not entitled to the monies comprising its claimed \$1.2 million-dollar shortfall and that Defendants properly calculated the judgment against Trask and paid those sums in full into the Court.

1. Potential Future Liabilities Have No Bearing on Judgment Calculation

Neither the Receiver's fees and costs nor any post-judgment fees and costs incurred by Encore's counsel are part of the judgment against Trask or Clear Touch. First and foremost, those fees and costs are not part of the judgments awarded in the Final Order, and, as such, cannot impact calculation of the judgments rendered in it. Second, both are possible future liabilities that Trask may be responsible for at a later date. Trask owing the Receiver's fees and costs is contingent upon all or part of the appeal being upheld. (*See* Receiver Order p. 9) ("If the Judgment is affirmed in whole or in part, Plaintiff shall be entitled to reimbursement of such payments from Trask's assets in addition to the Judgment and the legal, accounting, and other costs of collecting same."). Given the appeal remains unresolved, Trask does not yet owe the Receiver fees. Likewise, Trask

does not owe Encore's post-judgment attorney's fees and costs when Plaintiff has not petitioned the Court for their recovery, much less obtained an order awarding them.

Thus, Encore's opposition hinges upon whether Trask and Clear Touch are each separately liable for the payment of \$849,890 in exemplary damages under the Trade Secret cause of action. The Court finds they are not.

2. Defendants are Jointly and Severally Liable for the Trade Secrets Verdict

In calculating the outstanding judgment against Trask as of January 3, 2019, the Defendants credited him in full for Clear Touch's payment of the Trade Secrets award into the Court. That included the \$849,890 in exemplary damages. Encore argues that Trask miscalculated the judgment against him because he treated the \$849,890 in exemplary damages under the Trade Secrets claim as a joint and several liability rather than an individual and separate debt owed by each him and Clear Touch. In other words, Encore contends Trask should not have been credited for Clear Touch's payment of those exemplary damages and he remains liable for them. The Court finds Trask was rightfully credited for Clear Touch's payment of all of the Trade Secrets award because the Defendants are jointly and severally liable for every aspect of those damages, including exemplary damages.

As noted above, Encore was awarded a total of \$1,715,335.00 under its Trade Secrets claim alleged against both Defendants. That figure is comprised of three components; (1) Actual damages (\$424,945); (2) Exemplary Damages (2x actuals) (\$849,890); and (3) Attorney's fees and costs (\$440,500).

Clear Touch's April 2018 payment of the Trade Secrets award into the Court fully satisfied and secured the judgment against it. It also reduced Trask's judgment by eliminating his liability for the Trade Secret award. That reduction included the \$849,490 in exemplary damages.

Defendants calculated the outstanding judgment amount against Trask, including applicable post-judgment interest, as of January 3, 2019 by crediting him for Clear Touch's payment of the Trade Secrets verdict into the Court.

Encore concedes that the Defendants are jointly and severally liable for the actual damages and attorney's fees and costs components of the Trade Secret award, but argues that Clear Touch and Trask are each responsible for the payment of the full exemplary damages amount of \$849,890. Accordingly, Encore contends that it may recover \$849,890 in exemplary damages under the Trade Secrets claim twice—once from each Defendant—for a total recovery of \$1,699,780 in exemplary damages. Encore's argument relies upon a footnote in the Final Order that states "Each Defendant, however, will owe exemplary damages of \$849,890 for this claim because each engaged in willful, wanton, and reckless disregard of the Plaintiff's rights." (Final Order p. 11 fn3). Encore is mistaken and Defendants' liability for all aspects of the Trade Secrets award must be joint and several to avoid running afoul of the controlling law and in light of the fact it was treated as such at trial. Otherwise Encore would be able to recover quadruple its actual damages by recovering punitive damages for the same claim twice. The law prohibits Encore recovering exemplary damages for trade secret misappropriation in that amount and does not allow a party to recover the same damages more than once.

The South Carolina Trade Secrets Act specifies limits the amount of exemplary damages recoverable for violation of the Act to no more than two times the actual damages awarded for the misappropriation, stating in pertinent part that:

- (A) A complainant is entitled to recover actual damages for misappropriation of trade secrets....
- (B) Damages may include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss....

(C) Upon a finding of willful, wanton, or reckless disregard of the plaintiff's rights, the court *may award separate exemplary damages in an amount not exceeding twice any award made under subsection (A).*

S.C. Code Ann. § 39-8-40 (*emphasis added*). The clear and unambiguous language of the statute caps the amount of exemplary damages a court can award for trade secret misappropriation to no more than twice the actual damages awarded for violation of the Act. *Hodges v. Rainey*, 314 S.C. 79, 85 (Ct. App. 2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."). To adhere to that limitation, Defendants' liability for all aspects of the Trade Secrets award must be treated as joint and several.

In this case, the jury awarded \$424,945 in actual damages, therefore limiting the exemplary damages Encore could recover under its Trade Secrets claim to \$849,890. The Court awarded the fullest amount of exemplary damages available. Clear Touch paid that amount into the Court and Trask rightfully credited himself for that payment when calculating the judgment against him as of January 3, 2019. Making each Defendant liable for that entire amount would result in an exemplary damages award of four times the actual damage verdict in violation of the Act. It also would allow Encore to recover the same punitive damages arising from single wrong twice; an outcome prohibited by well-established common law. *See Smith v. Strickland*, 314 S.C. 192, 197, 442 S.E.2d 207, 210 (Ct. App. 1994) ("As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages, where their recovery concerns a single wrong."). Finally, at trial Defendants' liability for the alleged trade secret misappropriation was treated as joint and several as reflected by the wording of the Verdict Form for that cause of action. (Verdict Form p. 4)(Special Interrogatory to

the jury asked "Was the Defendants' conduct in violating the South Carolina Trade Secrets Act committed by the Defendants in a willful, wanton, or reckless disregard of Plaintiff's rights?").

Therefore, the SCTSA, common law, and treatment of Defendants' liability for the alleged trade secret misappropriation at trial mandate that their liability for the Trade Secrets award be joint and several. Accordingly, Trask's calculation of his judgment liability as of January 3, 2019 correctly credited him for Clear Touch's payment of the Trade Secret award and the Defendants have paid the entirety of the judgments against them into the Court.

3. Receiver Fees and Costs to be Held in Trust

As noted above, Trask may be liable for the Receiver's fees and costs should Encore prevail in whole or part on appeal. Although the appeal remains pending, and Trask does not currently owe the Receiver's fees and costs, the Court finds it prudent to require him to deposit the total Receiver fees and costs incurred through February 7, 2019 with the Receiver. Those funds will be held in trust pending resolution of the appeal until further Order of this Court. Should Encore prevail on appeal, in whole or in part, then it will have a right to collect the Receiver fees and costs, including but not limited to any fees or costs incurred by the Receiver after February 7, 2019, following a hearing to address the same. During that hearing, Defendants will have the opportunity to challenge the reasonableness of the fees and costs incurred by the Receiver.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. Immediately upon Trask's deposit with the Receiver of the Receiver fees and costs incurred through February 7, 2019, the Receivership established under the Receiver Order shall be stayed, and the Receiver relieved of any and all power and authority afforded him under the Receiver Order except as set forth herein;
2. Immediately upon Trask's deposit of the Receiver fees and costs incurred through February

7, 2019, Defendants or their agents may take any actions necessary to remove the Receiver's oversight, ownership, possession, control, or interest in any and all assets or other property of any kind which was taken or otherwise placed under the Receiver's custody, possession, control, or oversight pursuant to the Receiver Order;

3. Within forty-eight (48) hours of Trask's deposit of the Receiver fees and costs incurred through February 7, 2019, the Receiver shall return any and all assets or other property of any kind to the party from which it was taken or otherwise placed under the Receiver's custody, possession, control, or oversight but may maintain all documents he has collected in this matter;
4. Within forty-eight (48) hours of Trask's deposit of the Receiver fees and costs incurred through February 7, 2019, the Receiver shall take all actions necessary to unencumber any and all assets or other property of any kind he has encumbered, in his role as Receiver in this case.

IT IS SO ORDERED.

The Honorable R. Lawton McIntosh
Judge, Tenth Judicial Circuit

Entered this ____ Day of _____, 2019.



Greenville Common Pleas

Case Caption: Encore Technology Group LLC vs. Keone Trask , defendant, et al

Case Number: 2015CP2305757

Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2019-03-08 14:34:19 page 11 of 11