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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas,

Alex Kinlaw, Jr., Circuit Court

Appellate Case No. 2021-001137

Jennings-Dill, Inc., Respondent,

v.

Eric Israel, Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February July 20, 2021, Jennings-Dill, Inc. ("Jennings-Dill") brought this action alleging conversion, breach of duty of loyalty, breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10 *et seq*., misappropriation of trade secrets under the South Carolina Trade Secrets Act, S.C. Code § 39-8-10 *et seq.*, civil conspiracy, unjust enrichment/quantum meruit, and tortious interference with contractual relations. (R.pp. 017-034).

On the same day, Jennings-Dill filed a Plaintiff's Notice of Motion and Motion for Temporary Injunction (the "Motion"). (R.pp. 071-76). Jennings-Dill filed a memorandum in support of the Motion on July 29, 2021, along with supporting affidavits including the affidavit of Andy Locklair. (R.pp. 077-115). On August 2, 2021, Eric Israel filed Defendant's Opposition to Plaintiff along with supporting affidavits from himself and Scottie Strickland. (R.pp. 116-

134). Jennings-Dill then filed a supplemental affidavit signed by Andy Locklair on the same day. (R.pp. 135-150).

On August 4, 2021, a hearing was held on the Motion in front of the Honorable Alex J. Kinlaw Jr. No testimony was taken; the affidavits were the only sworn statements in the record. Judge Kinlaw issued a Form 4 Order directing both parties to submit proposed orders. (R.pp. 002-005). After submission of the proposed orders, Judge Kinlaw issued the order (the "Order") now subject to this appeal on September 9, 2021, granting the Motion and issuing a temporary injunction. (R.pp. 006-0016).

STANDARD OF REVIEW

"The grant of an injunction is reviewed for abuse of discretion." *Hook Point, LLC v. Branch Banking & Trust Co.*, 397 S.C. 507, 725 S.E.2d 681 (S.C. 2012). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Id.* (quoting *Peek v. Spartanburg Reg'l Healthcare Sys*., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App.2005)).

FACTS

Appellant Eric Israel worked at Jennings-Dill for approximately 11 years as an at-will employee with no restrictive covenants. Israel started as a plumber and was eventually promoted to foreman and then superintendent. (R.p. 126, Israel Aff. ¶ 3). As with many professions, there is currently a labor shortage for plumbers resulting is a market-wide rise in wages. (R.p. 126, Israel Aff. ¶ 5). Mr. Israel repeatedly raised to Jennings-Dill that they were paying below market rates and needed to raise wages to retain employees. (R.p. 126, Israel Aff. ¶¶ 4,6). Mr. Israel also requested a raise for himself to remain at a fair wage. (R.p. 126, Israel Aff. ¶ 6). On June 13,

2021, Mr. Israel sent an email to Jennings- Dill's management giving notice of his resignation effective July 8, 2021. (R.p. 126, Israel Aff. ¶ 6). At that time, he did not have any offers of employment and resigned out of frustration over the low compensation being paid to those he supervised and himself. (R.p. 126, Israel Aff. ¶ 6).

On June 24, 2021, Andy Locklair, Vice President of Operations for Jennings-Dill, and Israel spoke on the phone regarding Israel's resignation scheduled for July 8, 2021. (R.p. 126, Israel Aff. ¶ 7; R.pp. 078-79, Locklair Aff. ¶¶ 1, 9-10). The parties dispute whether Israel resigned on this phone call. Locklair averred that Israel resigned. (R.p. 078, Locklair Aff. ¶ 9.) Israel averred that he was terminated by Locklair the following morning and told he did not need to work through July 8, 2021. (R.p. 126, Israel Aff. ¶ 7.) Regardless, on June 25, 2021, Mr. Israel received an email stating that he was terminated immediately and could not work out the remainder of his notice period. (R.p. 126, Israel Aff. ¶ 7). At that time, Mr. Israel did not have a job lined up and was unemployed due to being terminated without warning. (R.p. 126, Israel Aff. ¶ 8). Mr. Israel was hired by Place Services, Inc. ("PSI") on July 6, 2021. (R.p. 127, Israel Aff. ¶ 9).

Also on the evening of June 24, 2021, Anthony Driggers, a plumber with Jennings-Dill, inquired with Mr. Israel about a raise he had been promised. (R.p. 127, Israel Aff. ¶ 10). During the conversation, Mr. Israel opened Sharepoint on his company issued iPad to check Mr. Driggers' current pay rate. (R.p. 127, Israel Aff. ¶ 11). The file he initially tried to open failed to open on the iPad due to its large size. (R.p. 127, Israel Aff. ¶ 11). Mr. Israel then tried to open the file again. Finally, he tried a different file to check Mr. Driggers' payrate. (R.p. 127, Israel Aff. ¶ 11). None of files showed Mr. Drigger's payrate. (*Id.*) These three files were named "Personnel Report," "Personnel Report Jan 2021 - Dec 2021," and "JD Employee List." (R.p. 081, Locklair

Aff. ¶¶ 20-23.) These three files are the alleged trade secret and confidential information upon which this case is based. Mr. Locklair was aware Israel had accessed these files on the morning of June 25, 2021. (R.p. 081, Locklair Aff. ¶¶ 18-20.) Mr. Israel returned the iPad to Jennings-Dill on the same morning. (R.p. 127, Israel Aff, ¶ 13). Mr. Israel didn ot misappropriate, take, copy, or otherwise retain any the files he viewed on the iPad. (R.p. 127, Israel Aff, ¶ 12). Mr Israel has not possessed any confidential or trade secret information belonging to Jennings-Dill since he returned the iPad to Jennings-Dill on June 25, 2021, and never provided such information to any other entity including PSI. (R.p. 127, Israel Aff. ¶¶ 12-14).

Mr. Israel started with PSI on July 6, 2021. Sometime later, Scottie Strickland, a Jennings- Dill employee, contacted Mr. Israel to ask if PSI was hiring because he was leaving Jennings- Dill.[1] (R.p. 127, Israel Aff ¶ 15; R.p. 133, Strickland Aff. ¶¶ 7-8). Mr. Israel did not solicit any Jennings-Dill employee to leave their position, nor has he offered any jobs to any Jennings-Dill employees. (R.p. 127, Israel Aff. ¶ 16).

ARGUMENTS

I. BECAUSE NO EVIDENCE WAS PRESENTED TO SHOW THAT APPELLANT POSSESSED OR MISAPPROPRIATED RESPONDENT'S TRADE SECRET OR CONFIDENTIAL INFORMATION, THE TRIAL COURT ERRED BY ISSUING A TEMPORARY INJUNCTION BY FINDING RESPONDENT HAD A LIKELIHOOD TO SUCCEED ON THE MERITS.

The court erred by finding Jennings-Dill had a likelihood of success on the merits despite the record not containing any evidence Israel possessed or misappropriated any trade secret or other confidential information belonging to Jennings-Dill. "The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal

[1] Israel previously discouraged Strickland from leaving Jennings-Dill. (R.p. 133, Strickland Aff. ¶ 5).

duties are willfully or wantonly neglected." *LeFurgy v. Long Cove Club Owners Ass'n*, 313 S.C. 555,443 S.E.2d 577, 578 (Ct. App. 1994); *Carter v. Lake City Baseball Club*, 218 S.C. 255, 62 S.E.2d 470 (1950). A preliminary injunction should be issued when it is necessary "to preserve the status quo ante." *Hook Point, LLC*, 397 S.C. at 511, 725 S.E.2d at 683. Under South Carolina law, to obtain a preliminary injunction, a plaintiff must show: (1) irreparable harm; (2) a likelihood success on the merits; and (3) an inadequate remedy at law. *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018) (citing *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010)). "A trial court may consider a case's merit to the extent necessary to determine whether a temporary injunction should issue." *Greenville Bistro, LLC v. Greenville Cnty*., Appellate Case Nos. 2017-001747 and 2018-001393 (S.C. Sup. Ct. filed December 8, 2021) (quoting *Curtis v. State*, 345 S.C. 557, 577, 549 S.E.2d 591, 601 (2001)).

Jennings-Dill sought an injunction based on its causes of action brought under the South Carolina Trade Secrets Act, the South Carolina Unfair Trade Practices Act, and claims for unjust enrichment and conversion. (R.pp. 100-105, Jennings-Dill Memo in Support pgs. 13-18). Each of these claims relies on Jennings-Dill's allegations that Israel misappropriated three electronic files containing what are alleged to be trade secrets belonging to Jennings-Dill. (*Id.*; R.pp. 19-34, Complaint ¶¶ 20-24; 40-41 [conversion]; 57-60 [South Carolina Unfair Trade Practices Act]; 74-78 [South Carolina Trade Secrets Act]; 98 [unjust enrichment]). Israel is not under any non-solicitation agreement with Jennings-Dill. The factual nexus for the injunction fully rests on the allegation that Israel took the three files containing confidential information on July 24, 2021.

"Because injunctive relief is a drastic remedy, a lower court must clearly communicate the reasoning behind its decision to issue an injunction." *Greenville Bistro, LLC v. Greenville Cnty*.,

Appellate Case Nos. 2017-001747 and 2018-001393 (S.C. Sup. Ct. filed December 8, 2021) (citing Rule 65(d), SCRCP (""Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained")). The court found that Israel downloaded three files containing confidential and trade secret information on June 24, 2021, onto Jennings-Dill's iPad. (R.pp. 008-9 Order ¶¶ 7-8). The court then summarily concluded without any factual support that Israel misappropriated the three files and subsequently used them to solicit employees for his new employer. The court found Israel "apparent[ly] use[d]" the three downloaded files to solicit Jennings-Dill employees. (R.pp. 009-10, Order ¶ 13). The record contains no support for these assumptions.

Jennings-Dill failed to put forward any evidence that Appellant possessed or misappropriated any trade secret or other confidential information belonging to Jennings-Dill outside of his company issued iPad. Jennings-Dill alleges that Appellant misappropriated or converted three files accessed on a company-issued iPad between 8:53 and 8:55 pm on June 24, 2021. (R. pp. 21-22, Complaint ¶¶ 20-24). None of the affidavits filed by Jennings-Dill state that Mr. Israel ever copied, downloaded, or otherwise removed these files from Jennings-Dill's iPad, which was promptly returned to Jennings-Dillon June 25, 2021, as requested by Andy Sinclair. (R.pp. 126, 128-130, Israel Aff. ¶ 7, Ex. A). The record does not contain a single piece of evidence to show that Israel possessed any of these three files since he returned the iPad on June 25, 2021.

The only evidence in the record before the court regarding the three files after June 24, 2021 was the sworn affidavit of Israel which stated that he did not misappropriate any of Jennings-Dill's files at any time and has not possessed any confidential or trade secret

information since he returned his iPad to Jennings-Dill on June 25, 2021. (R.p. 127, Israel Aff. ¶¶ 12-14). Israel averred he has not ever provided any individual or entity including his current employer any confidential or trade secret information belonging to Jennings-Dill. (*Id*.) The court made noo mention of this evidence in its Order and instead summarily ruled the three files were "apparent[ly]" misappropriated without any evidentiary support. (R.pp. 009-10, Order ¶ 13.)

II. BECAUSE THE COURT EXCLUSIVELY RELIED ON HEARSAY AND SPECULATIVE STATEMENTS IN AFFIDAVITS TO FIND APPELLANT SOLICITED RESPONDENT'S EMPLOYEES, THE TRIAL COURT ERRED BY ISSUING A TEMPORARY INJUNCTION BY FINDING RESPONDENT HAD A LIKELIHOOD TO SUCCEED ON THE MERITS.

The court erred in relying on hearsay statements in affidavits to find that Israel was soliciting Jennings-Dill employees. The court found that Israel had "apparent[ly] use[d]" the three downloaded files to solicit Jennings-Dill employees. (R.pp. 009-10, Order ¶ 13). The court erred by relying solely on the hearsay and speculative statements in Andy Locklair's affidavits to prove the truth regarding the solicitation of its employees to support an injunction. Courts may not rely on statements in affidavits that lack personal knowledge or are hearsay to establish a fact. *Englert, Inc. v. Netherlands Ins. Co*., 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct. App. 1993); *Jones v. Doe*, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006) (hearsay improper in affidavit and does not satisfy personal knowledge requirement)); *see also Fairfield Resorts, Inc. v. Fairfield Mountains Prop. Owners Ass'n, Inc*., CIV. 1:06-cv-191, 2007 WL 186537 (W.D.N.C. Jan. 22, 2007) ("Plaintiff's injunction is based purely on hearsay and speculation by Duncan which is insufficient to establish Plaintiff's need for an injunction.") (citing *Atari Games Corp. v. Nintendo of Am., Inc*., 897 F.2d 1572, 1575 (Fed. Cir. 1990) (a trial court "should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted

by plaintiff.").

Jennings-Dill submitted two affidavits from Andy Locklair to support its position Israel solicited Jennings-Dill employees. These were the only evidence in the record to support the court's finding of wrongful solicitation by Israel. Mr. Locklair's affidavits rely on hearsay statements and Mr. Locklair's personal speculation. Jennings-Dill did not submit ***any*** direct evidence of solicitation by Mr. Israel. Locklair's affidavits do not contain any personal knowledge of solicitation by Mr. Israel. Mr. Locklair stated it was his "understanding" that Israel was collaborating with another former Jennings-Dill employee to solicit employees. (R.p. 82, Locklair Aff. ¶ 29.) Locklair swore "it seems logical" the two were working together and he "believed it will be clear" after discovery. (R.p. 83, Locklair Aff. ¶ 34.) Locklair stated he has "received reports" of Israel entering Jennings-Dill jobsites to solicit employees. (R.p. 83, Locklair Aff. ¶ 35.) Locklair specifically cited that Scottie Strickland, a former Jennings's Dill employee now at PSI, had "told" [Jennings-Dill] that he and his brother were solicited by Israel. (R.p. 83, Locklair Aff. ¶ 36.) Locklair swore that Strickland "told our Operations Manager" this information, who presumably then told Locklair. (R.p. 139, Locklair Supplemental Aff. ¶ 23.) This is contrary to Strickland's own affidavit also before the court. (R.pp. 133-34, Strickland Aff.). Locklair stated he was "aware" of Israel soliciting four other employees but did not identify who these employees were or how he had the information. (R.p. 83, Locklair Aff. ¶ 36) Finally, Locklair stated without any factual evidence he "believe[s] we will find out that most of [plumbers who left Jennings-Dill] have gone to work for PSI." (R.p. 85, Locklair Aff. ¶ 41) These statements lack personal knowledge and are purely speculative. Such statements are not sufficient to support the issuance of an injunction.

In contrast to Locklair's affidavits, Israel submitted direct evidence to the court in an

affidavit swearing that he has not solicited any Jennings-Dill employee to leave Jennings-Dill or to join PSI. (R.p. 125-131, Israel Aff.) Also in the record was the affidavit of Scottie Strickland stating that he was *not* solicited by Mr. Israel and that he in fact reached out to Mr. Israel seeking employment at PSI. (R.pp. 133-34, Strickland Aff.) The court erred by relying on hearsay and speculative statements in Locklair's affidavits over the direct evidence provided by Israel when it issued the injunction.

III. THE TRIAL COURT ERRED BY IMPROPERLY "BALANCING THE EQUITIES" BETWEEN THE PARTIES BY COMPARING THE ALLEGED HARM TO EACH PARTY TO SUPPORT ISSUANCE OF THE TEMPORARY INJUCTION.

The court improperly weighed the relative harms to each party to determine if an injunction was warranted. The Supreme Court of South Carolina has explicitly held "balancing the equities" is "neither necessary nor appropriate in a preliminary injunction case…." *Poynter Invs. Inc. v. Century Builders of Piedmont, Inc*., 387 S.C. 583, 694 S.E.2d 15, 159 Lab.Cas. P 61 (2010). The *Poynter Invs. Inc.* Court held that "the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test." *Id.*

In the case at bar, the court held the following in Paragraph 23 of its order:

> Although this Court does not engage in a balancing test between the irreparable harm that Jennings-Dill would suffer in the absence of injunctive relief versus whatever harm Israel could suffer if the Court grants injunctive relief, it is appropriate for this Court, sitting in equity, to consider the impact on Israel. It appears that a grant of the relief Jennings-Dill seeks would have little impact on Israel.

(R.pp. 11-12, Order ¶ 23).

Despite the court's attempted disclaimer, the court clearly did exactly what was forbidden in *Poynter Invs. Inc.* An injunction is an extraordinary and drastic remedy. *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). The court issued this drastic remedy

by weighing the harm to potential Israel against the potential harm against Jennings-Dill. As noted in *Poynter*, such a test is not appropriate. Instead, Jennings-Dill, as the movant, was required to establish: (1) that it would suffer irreparable harm if the injunction were not granted; (2) was likely succeed on the

merits of the litigation; and (3) there is an inadequate remedy at law. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009). The court's reliance on weighing the relative harms caused by the injunction or lack thereof is reversible error.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

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