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COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

TROY INDUSTRIES, INC. vs. SAMSON MANUFACTURING CORPORATION &  
another (No. 1). [FN1]

09-P-1571

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendants, Samson Manufacturing Corporation and Scott A. Samson (collectively, Samson), appeal from a judgment entered on August 13, 2007, after a jury trial in the Superior Court, and from the denial of their postjudgment motions. The judgment awarded damages to the plaintiff, Troy Industries, Inc. (Troy), based on Samson's violation of a confidentiality agreement and violation of G. L. c. 93A. We affirm.

Because no issues of wider interest are raised in this appeal, and because the parties are thoroughly familiar with the lengthy litigation history of this case since 2005, it is unnecessary to repeat that background, and we proceed directly to consider the issues briefed by Samson and Troy. [FN2]

Discussion. Samson prefaces its argument on the four issues raised in its brief with assertions that the trial judge erred in denying its motion for a directed verdict and its motion for judgment notwithstanding the verdict, alleging that there was insufficient evidence to support the jury's finding that Troy had trade secret protection for its Modular Rail Forend (MRF) handguard. Samson properly does not directly pursue these assertions. We discern that Samson did not renew its directed verdict motion at the close of all the evidence, and therefore waived the right to a review of the denial of that motion as well as the right to appeal the denial of its motion for judgment notwithstanding the verdict. *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 8-9 (1983). *Powers v. H. B. Smith Co.*, 42 Mass. App. Ct. 657, 666 (1997).

1. Challenge to trade secret protection for the MRF. This argument is not directed at the judge's denial of the three postjudgment motions, but appears to be a continuation of Samson's challenge to issues raised in its

motions for a directed verdict and for judgment notwithstanding the verdict. In summary, those issues are (1) that Troy never has precisely articulated the trade secrets or confidential information covered by the confidentiality agreement; and (2) Troy publicly disclosed the MRF at a trade show in February, 2004, thereby losing trade secret protection. While we are not required to consider these issues, we choose to do so in the interests of efficient administration of justice.

Samson argues that the confidentiality agreement did not create trade secret protection because it does not specify what is confidential, and that Troy 'never spelled out that the MRF was confidential.' '[A] contractual agreement without more does not afford [trade secret] protection. It must be shown that the [items to be protected] are in fact trade secrets and that access to them was gained in confidence [footnotes omitted].' *Wheelabrator Corp. v. Fogel*, 317 F. Supp. 633, 637 (W.D. La. 1970), quoted in *Dynamics Research Corp. v. Analytic Sciences Corp.*, 9 Mass. App. Ct. 254, 277 (1980). [FN3]

Here, Troy required in the confidentiality agreement entered into in April, 2003, that all its documentation and confidential business information provided to Samson not be disclosed or used by Samson. [FN4] The agreement did not list specific items, such as the MRF. Samson, while being engaged to provide machine services in manufacturing the MRF, had access to Troy's various product ideas, which were drawn by David Beudet, a design engineer recommended by Samson. [FN5] After reaching a final design, Troy, in May, 2004, hired Robert Conley, a design engineer introduced by Samson, to prepare production drawings. [FN6] '[I]t is well settled that detailed manufacturing drawings . . . are prima facie trade secrets.' *A.H. Emery Co. v. Marcan Prods. Corp.*, 389 F.2d 11, 16 (2d Cir.), cert. denied, 393 U.S. 835 (1968), quoted in *USM Corp. v. Marson Fastener Corp.*, 379 Mass. 90, 100 (1979). Moreover, Troy took reasonable precautions to protect its trade secrets, including entering into the express agreements restricting disclosure, confining the revelation of its trade secrets to Samson so as to avoid their acquisition by unauthorized third parties, stressing confidentiality of the designs and work orally to Samson, and designating drawings as proprietary. Compare *id.* at 98-99.

Samson nevertheless asserts that Troy lost its trade secret protection when it exhibited the MRF at a trade show in February, 2004, and when it subsequently sold a number of the devices. Samson asserts that its duty to protect Troy's trade secrets expired when the MRF was publicly disclosed. Whatever effect such public disclosure may have had on Troy's competitors, Samson was still bound by the confidentiality agreement. [FN7] Moreover, while anyone may use a trade secret 'who fairly, by analysis and

experiment, discovers it,' *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 168 (1979), here it appears that Samson 'acquired the information as a result of a confidential relationship . . . with [Troy], and, if [Samson] has used the information without the permission of [Troy], then [Samson's] use of the information is wrongful, and [Samson] is liable to [Troy] in damages.' *Ibid.* [FN8]

We conclude there was ample evidence to support the jury's principal findings: that Troy provided trade secrets or confidential business information to Samson after entering into a confidentiality agreement; that Samson used the trade secrets and confidential business information; and that Samson breached the agreement by using the secrets and information to manufacture the MRFS. [FN9], [FN10]

We now turn to Samson's arguments on the three postjudgment motions, all seeking a new trial. The judge denied the motions without a hearing on September 24, 2007.

2. Alleged improper admission of Troy's patent. Samson complains that admitting in evidence a patent Troy obtained for the MRF was highly prejudicial and reversible error. However, the judge allowed it to be admitted for a limited purpose, and instructed the jury as follows:

'[Y]ou've heard evidence that the Patent Office issued a patent to Troy Industries on May 15, 2007, regarding its alleged invention of the Modular Rail Forend . . . . That patent has legal consequence only to the extent that if you were to find that Samson [has] liab[ility] to Troy of any kind, you may award Troy damages only for the period that ends on May 15th, 2007, which is the date on which the patent issued . . . . I remind you that there has been no trial or hearing either in the Patent Office or in the Federal Court as to who is the true inventor of the MRF, and you may not consider the issuance of the patent as evidence that Troy was the true inventor, nor may you consider the issuance of a patent as evidence of a trade secret. You may consider the issuance of a patent, however, to be conclusive that whether there was or was not a trade secret before May 15th, 2007, there was no longer any trade secret as of May 15th, 2007 because of the publication of the information contained in the patent application to the general public by the issuance of the patent.'

In his decision on this motion, the judge stated he was satisfied that the admission of 'certain patent documents, with instructions as to the limited purpose for which they may be considered, provided appropriate guidance to the jury and did not unfairly prejudice Samson.' The judge also stated: 'Samson appears to concede that the instruction this Court provided the jury in its final instructions was an accurate statement of law, but insists that the

jury could not be expected to have abided by it. This Court sees no reason to believe that the jury was either unable or unwilling to comply with this instruction.'

The judge thoroughly and carefully sought to remove ownership of the patent from the jury's consideration throughout the trial. His instructions clearly and forcefully limited their consideration to the end of the period during which damages could be considered, and withdrew from their consideration any question of the patent as evidence of a trade secret or Troy as the inventor. Juries are presumed to follow such clear and forceful instructions, and no reason appears to believe that Samson was prejudiced. See *Stricker v. Scott*, 283 Mass. 12, 14-15 (1933); *Harris-Lewis v. Mudge*, 60 Mass. App. Ct. 480, 490 (2004).

3. Award of G. L. c. 93A damages. Samson moved to amend the judgment to strike the finding of a G. L. c. 93A violation. In answering special verdict questions, the jury found that Samson breached the confidentiality agreement by using trade secrets or confidential business information in manufacturing its MRFS, and committed an unfair or deceptive act or practice in commerce, which was not wilful or knowing.

Samson asserts that a mere breach of contract will not sustain a violation of G. L. c. 93A. We note, however, that the trial judge concluded: 'The fact that the jury chose not to find that the violation was willful or knowing . . . does not suggest that the jury found that Samson committed an unfair or deceptive act or practice simply based on its breach of contract.' The judge stated that the 'evidence at trial was more than sufficient to support the jury's finding of a violation of Chapter 93A.' Samson is mistaken that the jury found a mere breach of contract. As we have stated, having wrongfully acquired and used confidential information without Troy's approval, Samson is liable to Troy in damages. *Jet Spray Cooler, Inc. v. Crampton*, supra at 168. Cf. *USM Corp. v. Marson Fastener Corp.*, supra at 104.

4. Proof of damages. Samson argues that Troy failed to prove it lost profits from sales lost because of Samson's sales of products that it produced using Troy's confidential information. The jury found that Troy suffered a loss of net profits prior to May 15, 2007, and stated that \$499,500 would fairly and reasonably compensate Troy for that loss. In considering Samson's motion for a new trial or remittitur, the judge stated that '[t]he evidence at trial as to damages, although barebones, was sufficient to support the jury's finding, and this Court does not find the jury's damage award either to be greatly against the weight of the evidence or the product of bias, misapprehension, or prejudice.'

The judge stated that there was testimony that Troy's net profit for the MRF was 'roughly' \$200 and testimony that Samson sold 3,019 MRF units during the relevant time period and, '[i]f the jury had accepted this testimony entirely and found that all the MRFs sold by Samson would have been sold by Troy, then it likely . . . would have awarded Troy \$603,800 [3,019 x \$200].' However, the judge stated that 'the jury exercised its appropriate discretion as factfinder to discount some part of the testimony and awarded Troy \$499,500 for its loss of net profits.'

Samson asserts that Troy failed to prove it lost net profits, repeating the argument made to the judge in its motion for a new trial. The judge found that 'Samson in [that] motion, provides evidence and arguments that it now wishes it had presented to the jury at trial, none of which can fairly be characterized as newly discovered evidence since all of this evidence was known to Samson (or available to Samson) at the time of trial.'

'The measure of damages in cases involving business torts such as the misappropriation of trade secrets entitles a plaintiff to recover full compensation for his lost profits and requires a defendant to surrender the profits which he realized from his tortious conduct.' *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. at 169. '[T]he plaintiff is entitled to the profit he would have made had his secret not been unlawfully used, but not less than the monetary gain which the defendant reaped from his improper acts (footnotes omitted). 2 R. Callman, *Unfair Competition, Trademarks and Monopolies* § 59.3, at 496 (3d ed. 1968),' quoted in *Jet Spray Cooler, Inc. v. Crampton*, *supra* at 170. The judge also denied Troy's motion for additur.

The judge concluded that, '[i]n considering whether to grant a new trial, this Court must consider the evidence presented at trial, not the evidence that the losing party, with the wisdom of hindsight, wishes it had offered or elicited,' citing *Turnpike Motors, Inc. v. Newbury Group, Inc.*, 413 Mass. 119, 127 (1992). We discern no abuse of the judge's discretion in denying Samson's postjudgment motions. [FN11]

Attorney's fees and costs. Troy requests an award of appellate attorney's fees and costs and is entitled to such an award pursuant to G. L. c. 93A. *Yorke Mgmt. v. Castro*, 406 Mass. 17, 19 (1989). Within fourteen days following the date of the issuance of the rescript of this decision, Troy may file with this court and serve on Samson a petition for fees and costs incurred in this appeal, supported by a detailed affidavit, in accordance with the procedure specified in *Fabre v. Walton*, 441 Mass. 9, 10-11 (2004). Within fourteen days thereafter, Samson may file with this court and serve on Troy an opposition.

Judgment dated August 13, 2007, affirmed. [FN12]

Order dated September 27, 2007, denying postjudgment motions affirmed.

By the Court (Cypher, Vuono & Rubin, JJ.),

Entered: March 21, 2012.

FN1. Scott A. Samson.

FN2. The parties are engaged in two other appeals which we decide separately. In case 2011-P-443, Samson appeals from the denial of its motion to set aside the damages award, alleging Troy committed a fraud on Samson and the court. In 2011-P-444, Troy appeals from the dismissal of its complaint for contempt against Samson for alleged violation of a permanent injunction issued on June 25, 2007, and amended on July 27, 2007.

FN3. The confidentiality agreement states in relevant part:

'Limited Right to Use the Information

All documentation (other than promotional materials), and confidential business information in whatever form recorded, that Troy Industries Incorporated may furnish to SAMSON MANUFACTURING CORP. in contemplation of or under this Agreement . . . , shall remain the property of Troy Industries Incorporated . . . .

. . .

'Obligation to Maintain Confidence.

Unless Troy Industries [I]ncorporated consents in writing, such Information, except for any part thereof as is previously known to SAMSON MANUFACTURING CORP. as publicly disclosed by Troy Industries [I]ncorporated[,] SAMSON MANUFACTURING CORP.[']s receipt of such Information from Troy Industries Incorporated, shall be treated in confidence by . . . its employees, agents, assignees and shall not be published, disclosed, disseminated or used in any manner by SAMSON MANUFACTURING CORP. except where explicitly provided by previous or subsequent agreement.'

FN4. In May, Troy placed a purchase order with Samson to machine 200 MRF handguards per month. In addition, Troy provided Samson with a

rotary indexer machine it did not have, and also loaned Samson \$6,000 to purchase a milling machine.

FN5. Troy paid Beudet for the drawings and believed the confidentiality agreement applied to him as Samson's employee.

FN6. Troy and Conley executed a separate confidentiality agreement.

FN7. By September 1, 2004, however, Samson had fallen behind in delivering the machined handguards and Troy terminated the purchase order. On November 24, 2004, Samson posted a Modular Rail Forend Samson (MRFS) on an Internet website, received orders, and sold some 3,000 handguards. Troy filed its complaint in the Superior Court on January 14, 2005.

FN8. Even where a plaintiff may not claim trade secret protection 'either because it failed to take reasonable steps to preserve its secrecy or because the information, while confidential, is only 'business information,' [the plaintiff] may still be entitled to some relief against one who improperly procures such information. The law puts its imprimatur on fair dealing, good faith, and fundamental honesty. Courts condemn conduct which fails to reflect these minimum accepted moral values by penalizing such conduct whenever it occurs.' *USM Corp. v. Marson Fastener Corp.*, 379 Mass. at 104.

FN9. The jury also found that Samson breached the confidentiality agreement in manufacturing the Forward Hand Grip and the Aimpoint Scope Mount, but did not breach the agreement in manufacturing the Folding Optical Sight.

FN10. In any event, the evidence is not such that we can say as matter of law that Troy's trade secrets were disclosed to the extent that it lost trade secret protection prior to the filing of the patent, or that Samson was relieved of its duty to protect Troy's trade secrets.

FN11. We acknowledge the receipt of a Mass.R.A.P.16(l), as amended, 386 Mass. 1247 (1982), letter after oral argument from Samson suggesting that a recent decision of this court, *Specialized Technology Resources, Inc. v. JPS Elastomerics, Corp.*, 80 Mass. App. Ct. 841 (2011), is in agreement with its argument based on *Atlantic Research Mktg. Sys., Inc. v. Troy*, 659 F.3d 1345 (Fed. Cir. 2011). Although we are aware of two references in Samson's brief stating that Troy was liable for misappropriating ARMS's trade secrets, there is no accompanying argument indicating that this was a live issue at trial. Accordingly, we have no occasion to consider these cases in this appeal. Because Samson's letter also was filed in the other two cases on appeal, it may have significance in those cases.

FN12. The judgment entered on August 13, 2007, contains an addition error. In ordering that Troy recover attorney's fees of \$136,000 and costs of \$16,004.92, the total should be \$152,004.92 and not \$152,000.82.

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