J-A35004-12

2013 PA Super 119

| | | |
|---|---|---|
| JACK AND LINDA KRAFFT, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellees | : | |
| | : | |
| v. | : | |
| | : | |
| LAWRENCE M. AND JANE A. DOWNEY, | : | |
| | : | |
| Appellants | : | No. 476 WDA 2012 |

Appeal from the Judgment entered February 24, 2012,
in the Court of Common Pleas of Potter County,
Civil Division, at No. 2007-579

BEFORE: DONOHUE, J., ALLEN, J., and STRASSBURGER, J.*

DISSENTING OPINION BY STRASSBURGER, J.: FILED: May 17, 2013

Because the Majority improperly judges subjective bad faith by an objective standard instead of applying the appropriate standard of review to the trial judge's findings, I respectfully dissent.

"Our standard of review of an award of attorneys' fees is well settled: we will not disturb a trial court's determinations absent an abuse of discretion. A trial court has abused its discretion if it failed to follow proper legal procedures or misapplied the law." ***Miller v. Miller***, 983 A.2d 736, 743 (Pa. Super. 2009).

The question is whether the learned trial court in the instant case abused its discretion in finding a lack of bad faith on the part of the Kraffts.

> Good faith, or its absence, involves a factual inquiry into the plaintiff's subjective state of mind: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it? A subjective state of mind will rarely be susceptible

*Retired Senior Judge assigned to the Superior Court.

> of direct proof; usually the trial court will be required to infer it from circumstantial evidence. [B]ad faith means simply that the action or tactic is being pursued for an improper motive. Thus, if the court determines that a party had acted with the intention of causing unnecessary delay, or for the sole purpose of harassing the opposing side, the improper motive has been found, and the court's inquiry need go no further.

***Gemini Aluminum Corp.***, 95 Cal.App.4th at 1263, 116 Cal.Rptr.2d at 369 (emphasis, quotations, and citations omitted). "A court may find subjective misconduct by relying on direct evidence of plaintiff's knowledge during certain points in the litigation and may also infer it from the speciousness of plaintiff's trade secret claim and its conduct during litigation." ***Computer Econs., Inc. v. Gartner Group, Inc.***, 1999 WL 33178020, *6 (S.D.Cal. December 14, 1999)

There is simply no evidence here that Kraffts engaged in subjective misconduct by bringing and maintaining their misappropriation claims. The Kraffts correctly note that the trial court, which observed the parties throughout the litigation, "was in the best position to determine whether Mr. and Mrs. Krafft acted with a subjective state of mind that warranted imposition of attorney fees." Kraffts' Brief at 5. Based upon its observation and interaction with the parties, and its credibility determinations, the trial court concluded that the Kraffts genuinely believed that Mrs. Krafft's experimentation resulted in a unique process. ***See*** Trial Court Opinion, 2/14/2012, at 2-3 (pages unnumbered).

Nor does the evidence offered by the Downeys compel a result that the Kraffts were reckless in failing to accept that their claims lacked merit before the Downeys put all their cards on the table with their motion for partial summary judgment.[1] That the Kraffts filed their claim after the Downeys provided an expert opinion unfavorable to the Kraffts certainly does not evidence recklessness; nearly all defendants obtain favorable expert reports regardless of the strength of the plaintiffs' cases. The additional discovery requested by the Kraffts after the Downeys' motion for a protective order was granted was related to the Downeys' new matter and counterclaims, as well as the Kraffts' claims of breach of contract and unjust enrichment based upon the fact that the Downeys "clearly learned a process to transfer and sell artwork on stone, together with instructions and marketing advice, advice as to handling the stones and methods, procedures or places to … market and sell the stones." Motion for Additional Discovery

[1] The Majority makes much of the fact that the Kraffts pursued their trade secret claims despite having been denied a preliminary injunction. ***See*** Majority Opinion at 17. However, the Majority fails to recognize that "a decision regarding a preliminary injunction is not binding for purposes of a final adjudication." ***Buck Hill Falls Co. v. Clifford Press***, 791 A.2d 392, 397 (Pa. Super. 2002). ***See also Philadelphia Fire Fighters' Union, Local 22, Intern. Ass'n of Fire Fighters, AFL-CIO v. City of Philadelphia***, 901 A.2d 560, 565 (Pa. Cmwlth. 2006). ("The preliminary injunction concludes no rights and is a final adjudication of nothing. Therefore, any legal conclusions that [the] common pleas [court] made in the context of granting a preliminary injunction to maintain the status quo could **not constitute a final adjudication as to the merits of any issue between the parties**.") (internal quotations and citations omitted; emphasis added).

and for Declaratory Judgment, 4/19/2010, at ¶ 16. After the Downeys filed their motion for partial summary judgment, setting forth all the evidence demonstrating that the Kraffts could not prevail on their UTSA claims, the Kraffts voluntarily agreed to discontinue those claims. They then proceeded to trial, at which the jury concluded that the Downeys breached the contract and the Kraffts were guilty of neither breach nor fraudulent inducement. This evidence does not compel a finding of recklessness. ***Accord Pixion, Inc. v. PlaceWare Inc.***, 2005 WL 3955890 (N.D.Cal. April 22, 2005) (finding "the record entirely devoid of evidence of subjective bad faith on plaintiff's part" where the plaintiff's trade secret claims arose out of the same set of facts as a valid breach of contract claim, and noting "[w]hile the Court ultimately disagreed with [the plaintiff's] arguments, plaintiff's maintaining of its position is hardly evidence of improper motive.").

Based upon this record, the Majority should have relied upon on the trial court's credibility determinations and fact finding regarding the Kraffts' subjective state of mind; noted the utter lack of evidence that the Kraffts acted with any improper motive; and, accordingly, concluded that the trial court did not abuse its discretion in denying attorney's fees to the Downeys.

It is clear from the extensive dicta in the Majority Opinion that the Majority is not fond of the objective/subjective test that has been applied by myriad courts which have considered UTSA claims for attorneys' fees. ***See,***

***e.g., Gemini Aluminum Corp., supra***; ***Contract Materials Processing, Inc. v. Kataleuna GmbH Catalysts***, 222 F.Supp.2d 733, 744 (D.Md. 2002); ***Knights Armament Co. v. Optical Systems Technology, Inc.***, 2012 WL 3932863 (M.D.Fla. August 20, 2012); ***Hill v. Best Medical Intern., Inc.***, 2011 WL 6749036 (W.D.Pa. December 22, 2011); ***Berry v. Hawaii Exp. Service, Inc.***, 2007 WL 689474 (D.Hawaii March 2, 2007); ***Degussa Admixtures, Inc. v. Burnett***, 471 F.Supp.2d 848, 858 (W.D.Mich. 2007), *aff'd,* 277 Fed.Appx. 530 (6th Cir. 2008).

Nonetheless, the Majority purports to apply the two-prong test in the instant case. ***See*** Majority Opinion at 13. In holding that the Kraffts are guilty of acting in bad faith because they should have known that they did not have a case, the Majority has made subjective bad faith the same as objective bad faith. Thus, it is the Majority, not the trial court, that has misapplied the law.