MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com
April 14, 2014
THE DOLAN COMPANY

Default judgment for co. in trade secret case

Spoliated evidence results in sanctions

By Eric T. Berkman

A company that sued several former salespeople for misappropriating trade secrets when they left to form a competing venture was entitled to a default judgment stemming from the salespeople's misconduct during the discovery phase, a Superior Court judge has determined.

Judge Bruce R. Henry found that the defendant salespeople had committed fraud on the court by falsely testifying that they had turned over all proprietary materials of the plaintiff, had spoliated evidence, and had disregarded an earlier preliminary injunction by Judge Thomas P. Billings that barred them from selling products to particular customers of the plaintiff to whom the proprietary information pertained.

The plaintiff company argued that those violations were grounds for a default judgment and assessment of counsel fees.

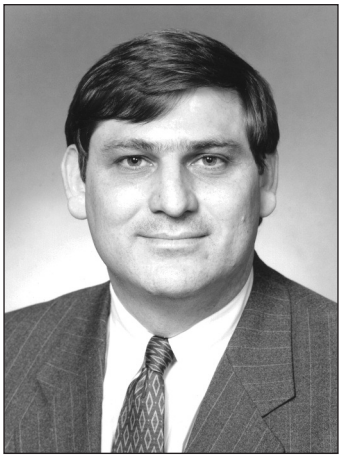
Henry agreed.

"All of these acts by each of the individual defendants … show, clearly and convincingly, that the defendants 'sentiently set in motion [an] unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate [this] matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense,'" Henry wrote in a January decision, quoting the Supreme Judicial Court's 1994 ruling in *Rockdale Management Co. v. Shawmut Bank. N.A.*

"The defendants' actions … show a blatant disregard for the judicial process and a disrespect of this court and its orders," he added. "Therefore, sanctions are in order."

Nonetheless, Henry issued a follow-up ruling earlier this month that the plaintiff was not entitled to a default judgment on all its counts. Instead, he found, the default judgment should cover only those counts relating to proprietary information that had been used to obtain business from customers that were the focus of Billings' preliminary injunction.

The decisions are *Pacific Packaging Products, Inc. v. Barenboim, et al.*, Lawyers Weekly Nos. 12-036-14 (36 pages) and 12-037-14 (seven pages). The full text of both rulings can be ordered at masslawyersweekly.com.



Michael Gottfried

A case of 'chutzpah'?

Plaintiff's counsel Michael Gottfried of Duane Morris in Boston said his client thinks the decision sends "a strong message to litigants who would contemplate committing a fraud on the court, spoliating evidence or ignoring court orders."

He declined to comment further.

Boston attorney Lee T. Gesmer, who handles trade secret cases and who represented the plaintiff in an unrelated matter a decade ago but was not involved in *Barenboim,* said the defendants must have had "serious chutzpah" to lie to the court the way they apparently had.

"Here, the only reason the defendants were caught was that one member of their conspiracy ratted them out," he said, referring to a defendant who, after becoming embroiled in a dispute with her co-defendants, informed the court that her initial affidavit was both false and coerced by other defendants and that the defendants had disregarded the injunction and discovery orders.

The Gesmer & Updegrove partner said the judge may have under-penalized the defendants for fraud on the court.

"Of course, we have yet to see what the plaintiff's attorneys' fee award will be. It could be very substantial," he said.

Shannon M. Lynch of Boston called the defendants' conduct "unfortunately fairly typical in trade secrets litigation."

For example, she said, employees often mistakenly believe they do not need to return or produce company information that they created during their tenure or sent to personal email accounts for work purposes during their tenure.

Nonetheless, she said, the defendants' actions diverged from the norm once they escalated from inadvertence to purposeful malfeasance and then attempted to cover it up.

From a practical standpoint, the case highlights how important it is for counsel to impress upon clients the need to fully understand and comply with preservation and production obligations, she added.

"Counsel should send litigation-hold notices to their own clients and any adverse parties and take affirmative steps to confirm compliance," said Lynch, a lawyer at Beck, Reed, Riden. "These steps are sometimes overlooked, especially in the case of individuals, which can be disastrous."

Both Gesmer and Lynch said the case has interesting implications from a technological standpoint.

"[It] highlights the importance of early forensic analysis of electronic devices, including USB activity and spoliation reports, which can be critical in evaluating adverse parties' representations and formulating a discovery strategy," Lynch said.

Meanwhile, Gesmer said he was struck by the sophistication Henry showed in analyzing the technology.

"As a new generation of judges moves onto the bench and as old judges become more familiar with technology, the judiciary becomes more comfortable dealing with situations involving multiple data devices and relying on the opinions of forensic firms," he said.

Alan D. Rose Sr. of Rose, Chinitz & Rose in Boston represented the defendants. He declined to comment.

CASE: *Pacific Packaging Products, Inc. v. Barenboim, et al.,* Lawyers Weekly No. 12-037-14 and 12-036-14

COURT: Superior Court

ISSUE: Was a company that sued several former salespeople for misappropriating trade secrets when they left to form a competing venture entitled to a default judgment stemming from the defendants' apparent misconduct during the discovery phase?

DECISION: Yes

Violating orders

Defendants James Barenboim, Andrew Slater, Steven Slater and David Guild worked as salespeople for plaintiff Pacific Packaging Products, a Wilmington-based distributor of packaging products.

On Oct. 15, 2009, the defendants resigned from Pacific Packaging, formed a competing company, Packaging Partners, LLC, and began operating the new venture the next day.

Defendant Sandra Zeraschi, a sales correspondent at Pacific Packaging who worked with Guild and both Slaters, resigned on Oct. 16, 2009, and went to work for Packaging Partners.

Before the defendants left Pacific Packaging, they gathered proprietary customer information. Some of the information was related to their own accounts, dealing with customers the defendants had been servicing themselves. However, other information dealt with customers serviced by other salespeople and from whom they hoped to secure business.

A significant portion of the information was saved as files on laptops that the defendants owned and used for both company and personal business.

On Nov. 4, 2009, the plaintiff sued the defendants in Superior Court, bringing nearly 20 different claims including allegations of misappropriation of trade secrets, misappropriation of corporate opportunities, breach of duty of loyalty and violation of Chapter 93A.

The plaintiff also filed a motion for expedited discovery and preservation of evidence.

On Nov. 19, 2009, Superior Court Judge Garry V. Inge granted the motion and ordered the production of documents that the plaintiff requested, the preservation of all documents and electronically-stored data relating to the plaintiff's claims, and the production of all such data to the plaintiff's counsel and experts.

Inge further ordered the production of all computers, laptops, removable storage devices and other devices used in connection with the defendants' business.

On Feb. 8, 2010, the plaintiff moved for a preliminary injunction requiring the defendants to turn over all Pacific Packaging documents and electronic files in their possession and barring the defendants from making sales for one year to any of the plaintiff's customers for which the defendants had taken confidential information.

On March 5, a different judge, Billings, ordered the defendants to turn over such materials and scheduled an evidentiary hearing for March 15.

At the hearing, the defendants each testified that they had turned over all required materials. Based on his review of the information, Billings found that the defendants had misused Pacific Packaging information in securing business from just one customer that they would not have obtained without such misuse.

Accordingly, Billings issued a preliminary injunction barring the defendants from selling particular products to that customer, Reynolds Food Packaging, for one year.

A year later, Zeraschi resigned from Packaging Partners. A dispute then arose between her and the other defendants over her eligibility for unemployment benefits. At that time, Zeraschi — who had submitted an affidavit earlier in the case denying that the defendants had solicited her before she resigned from Pacific Packaging — provided a new affidavit stating that the defendants had indeed been soliciting her for months before her departure, that they had put her up to taking confidential information and "making it difficult" for Pacific Packaging to figure out what had happened, and that they had coerced her into submitting a false affidavit.

Additionally, Zeraschi testified that the other defendants had not, in fact, turned over all the information despite testifying that they had, and that they were still actively using it to solicit the plaintiff's customers. She further stated that the defendants had been selling products to Reynolds in violation of Billings' injunction.

On the basis of Zeraschi's assertions, the plaintiff filed an emergency motion for judgment on all claims due to alleged fraud on the court.

Partial default

In his Jan. 31 findings of facts, Henry determined that the defendants had, indeed, acted in contempt of Billings' preliminary injunction by continuing to sell products to Reynolds other than those products they had been cleared to continue to sell.

He also found that the defendants had committed spoliation of evidence by failing to produce — and then later deleting — emails subject to Billings' discovery order and by failing to produce certain unknown USB devices that had been connected to some of the defendants' laptops and were thus subject to the discovery order.

Henry further found that they committed fraud on the court through the false affidavit they apparently had coerced Zeraschi into submitting and through the false testimony they had provided at the evidentiary hearings.

"After much consideration, I find that the appropriate sanctions here are the entry of default … with respect to some of the issues [in the complaint]; the dismissal of the defendants' counterclaims; and an order that the defendants compensate the plaintiff for the attorneys fees and costs," the judge said.

In an April 1 order, however, Henry limited the default judgment to claims related to 49 customers who had been the focus of the preliminary injunction hearing before Billings and a select group of other customers. MLW