

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHEMSTATION OF SEATTLE, LLC,
an Ohio limited liability company,

Respondent,

v.

JOHN DONAHOE, individually,

Appellant.

No. 77030-6-I

UNPUBLISHED OPINION

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VERELLEN, J. — John Donahoe argues that the trial court abused its discretion in granting ChemStation of Seattle, LLC (ChemStation) a preliminary injunction because the trial court did not make adequate findings of fact. We agree. Additionally, of the two noncompete agreements at issue, one was not supported by independent consideration, and the other contains no geographic limitation. Therefore, the trial court abused its discretion in determining that ChemStation was likely to succeed in enforcing those noncompete agreements as written. And as to ChemStation's misappropriation of trade secrets claim, the trial court failed to identify the trade secrets it concluded likely exist. For these reasons, we reverse and remand to the superior court for entry of findings of fact on the existing record.

FACTS

ChemStation is a local franchise of ChemStation International, Inc., which sells industrial soap products. In February 1999, ChemStation hired John Donahoe as a sales representative. Donahoe signed a noncompete agreement with ChemStation International when he was hired. In March of 2004, ChemStation promoted Donahoe to general manager and gave him a bonus. In July 2004, four months after his promotion, Donahoe signed another noncompete agreement with ChemStation.

In 2015, ChemStation lowered Donahoe's sales commission rate on existing customers from 40 percent to 37 percent and increased his commission on new business to 43 percent. The change was designed to encourage Donahoe to seek new business instead of focusing on existing customers. On March 6, 2017, ChemStation further reduced his sales commission to 30 percent.

A few days later, Donahoe called Wesmar Company, a local competitor of ChemStation, to inquire about a job. Wesmar offered Donahoe a job on March 15. He accepted the next day, with a March 30 start date.

Donahoe did not immediately inform ChemStation he had accepted a job at Wesmar. He continued to make customer site visits. On March 16, he also purchased a new laptop for use at Wesmar, downloaded the contents of his ChemStation laptop to the new laptop, and immediately began using the new laptop. On March 24, Donahoe reinstalled the operating system on the old laptop, which deleted all of the information on that laptop.

On March 24, Donahoe asked Brad Clemons, the president of ChemStation, to provide a copy of Donahoe's noncompete agreement. The two argued, and Clemmons revoked Donahoe's access to all ChemStation systems except e-mail. Donahoe turned in the old laptop at this meeting. He returned to work on March 27, made some service calls to existing customers, and then resigned by e-mail on March 29. When he resigned, Donahoe was a high-performing sales manager who brought in approximately 60 to 65 percent of ChemStation's total revenue.

On April 6, 2017, ChemStation sued Donahoe in King County Superior Court, alleging he breached the noncompete agreements and misappropriated trade secrets in violation of the Uniform Trade Secrets Act, chapter RCW 19.108 (UTSA). The trial court granted ChemStation's motion for a preliminary injunction on June 2, 2017.¹ It denied Donahoe's motion for reconsideration on June 19, 2017.

This court granted Donahoe's motion for discretionary review.

ANALYSIS

The purpose of a preliminary injunction is to preserve the status quo until the trial court can conduct a full hearing on the merits of the complaint.² To obtain a preliminary injunction, a party must show (1) a clear legal or equitable right, (2) a

¹ We note that the trial court entered the order as proposed by ChemStation.

² Nw. Gas Ass'n v. Wash. Utils. & Transp. Comm'n, 141 Wn. App. 98, 115-16, 168 P.3d 443 (2007).

well-grounded fear of immediate invasion of that right, and (3) that the facts complained of either are resulting in or will result in actual and substantial injury.³ The plaintiff need not prove and the trial court need not resolve the merits of the issues underlying these three requirements.⁴ "Rather, the trial court considers only the *likelihood* that the plaintiff will ultimately prevail at a trial on the merits by establishing that he has a clear legal or equitable right, that he reasonably fears will be invaded by the requested disclosure, resulting in substantial harm."⁵ "To establish . . . a clear legal or equitable right, the moving party must show that it is likely to prevail on the merits."⁶ "If a party seeking a preliminary injunction fails to establish any one of these requirements, the requested relief must be denied."⁷

We review the trial court's decision to grant a preliminary injunction and the terms of that injunction for abuse of discretion.⁸ A court abuses its discretion when its decision is based on untenable reasons or grounds.⁹ "This can occur when a court applies an incorrect legal standard, substantial evidence does not support

³ Rabon v. City of Seattle, 135 Wn.2d 278, 284, 957 P.2d 621 (1998).

⁴ Nw. Gas Ass'n, 141 Wn. App. at 116.

⁵ Id.

⁶ Id. (alteration in original) (quoting San Juan County v. No New Gas Tax, 160 Wn.2d 141, 154, 157 P.3d 831 (2007)).

⁷ Kucera v. Dep't of Transp., 140 Wn.2d 200, 210, 995 P.2d 63 (2000).

⁸ Rabon, 135 Wn.2d at 284.

⁹ Wade's Eastside Gun Shop, Inc. v. Dep't of Labor and Indus., 185 Wn.2d 270, 277, 372 P.3d 97 (2016) (quoting Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 458-59, 229 P.3d 735 (2010)); Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n, 173 Wn. App. 778, 791, 295 P.3d 314 (2013).

the court's findings, or the findings do not meet the requirements of the correct standard."¹⁰

Findings of Fact

Donahoe argues that the trial court erred by failing to enter adequate findings of fact. We agree.

"To facilitate appellate review, a trial court must enter findings of fact and conclusions of law and set forth its reasons for issuing a preliminary injunction."¹¹

Here, there are no true findings of fact supporting the preliminary injunction.

The trial court entered the following combined "findings and conclusions":

1. To obtain injunctive relief, a party must show "(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." Tyler Pipe Indus., Inc. v. Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982); see also RCW 7.40.020.

2. ChemStation has a clear legal or equitable right to relief under the non-compete agreements executed by Donahoe. To establish a clear legal or equitable right, the moving party must show that it is likely to prevail on the merits. San Juan County v. No New Gas Tax, 160 Wn.2d 141, 154, 157 P.3d 831 (2007). Based upon the evidence and argument presented to the Court, ChemStation established that it is likely to prevail on the merits of its claim for breach of either or both of the noncompete agreements executed by Donahoe. ChemStation has shown a substantial likelihood that the agreements are enforceable and supported by consideration, and

¹⁰ In re Marriage of Rostrom, 184 Wn. App. 744, 750, 339 P.3d 185 (2014).

¹¹ San Juan County, 160 Wn.2d at 154 (citing CR 52(a)(2)(A); CR 65(d)). CR 52(a)(2)(A) requires findings of fact for "temporary injunctions," which likely applies to "preliminary injunctions" as used in CR 65. See 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 65 author's cmt. 8 at 676 (6th ed. 2013).

that Donahoe has violated and will continue to violate the agreements if not enjoined.

3. ChemStation has a clear legal or equitable right to relief under the Uniform Trade Secrets Act, ch. 19.108 RCW ("UTSA"). Based upon the evidence and argument presented to the Court, ChemStation established that it is likely to prevail on the merits of its claim for misappropriation of trade secrets under the UTSA. ChemStation has shown a substantial likelihood that legally protectable trade secrets exist, and that Donahoe has misappropriated and will continue to misappropriate trade secrets if not enjoined.

4. ChemStation has established that it has a well-grounded fear that Donahoe will immediately invade ChemStation's rights under the noncompete agreements and the UTSA, and that those rights have already been invaded by the actions of Donahoe on behalf of his new employer, Wesmar Company, Inc.

5. ChemStation has established that Donahoe's violations of the noncompete agreements and misappropriation of trade secrets have resulted in actual and substantial injury to ChemStation, and, unless enjoined, will result in further actual and substantial injury to ChemStation.^[12]

Donahoe is correct that these are conclusions of law that do not contain specific factual findings and do not explain the specific reasons for the trial court's decision. For example, there are no findings that explain why the trial court determined the 2004 noncompete agreement was supported by independent consideration, why the 24-month 1999 noncompete agreement lacking any geographic limitation was reasonable, or what information was determined likely to be a trade secret. Because the order does not specify the facts on which the trial court relied in granting the preliminary injunction, this court cannot meaningfully

¹² Clerk's Papers (CP) at 1097-98.

review the trial court's decision. The lack of adequate findings of fact requires that we reverse and remand.¹³

ChemStation argues that the trial court's "findings and conclusions' . . . clearly set[] forth its reasons for issuing the injunction."¹⁴ Rather than pointing to specific findings by the trial court that support the order, ChemStation argues that the trial court relied on evidence it "presented" and the court "received."¹⁵ Even so, its argument is devoid of any citations to the record that would allow this court to determine whether the trial court's findings were supported by substantial evidence. ChemStation's unsupported and conclusory arguments that Donahoe intentionally destroyed evidence and used stolen information to divert business to Wesmar are not persuasive.¹⁶

We reverse the preliminary injunction and remand to the trial court for further proceedings consistent with this opinion, including entry of adequate findings of fact on the existing record should ChemStation decide to pursue a renewed preliminary injunction. Additionally, we address Donahoe's substantive

¹³ See San Juan County, 160 Wn.2d at 154; see also Lyft, Inc. v. City of Seattle, ____ Wn.2d ____, 418 P.3d 102, 113 (2018) (holding that remand was necessary where trial court's findings of fact did not demonstrate an entitlement to injunctive relief under the standards required by the Public Records Act, ch. 42.56 RCW).

¹⁴ Resp't's Br. at 16.

¹⁵ Id. at 16-17.

¹⁶ See Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by citations to the record need not be considered).

arguments as to ChemStation's likelihood to succeed on its breach of contract and misappropriation of trade secrets claims.

Enforceability of the Noncompete Agreements

Donahoe argues that the trial court abused its discretion in finding that the 1999 and the 2004 noncompete agreements are likely enforceable. We agree.

Noncompete agreements are enforceable in Washington if they are validly formed and reasonable and no greater than reasonably necessary to protect the business or good will of the employer.¹⁷ Courts consider three factors to determine whether such an agreement is reasonable:

(1) whether the restraint is necessary to protect the employer's business or goodwill, (2) whether it imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether enforcing the covenant would injure the public through loss of the employee's service and skill to the extent that the court should not enforce the covenant.^[18]

Whether a covenant is "reasonably necessary" includes consideration of how the covenant adversely affects the employee's ability to earn a living.¹⁹ "Generally, a court determines the reasonableness of a covenant by analyzing its geographic and temporal restrictions."²⁰ The reasonableness of a noncompete agreement is

¹⁷ Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004); Cent. Credit Collection Control Corp. v. Grayson, 7 Wn. App. 56, 60-61, 499 P.2d 57 (1972).

¹⁸ Emerick v. Cardiac Study Ctr., Inc., P.S., 189 Wn. App. 711, 721-22, 357 P.3d 696 (2015).

¹⁹ Id. at 724.

²⁰ Id.

determined by the court as a matter of law and is reviewed de novo on appeal, absent disputed facts.²¹

Here, the trial court concluded, "ChemStation has a clear legal or equitable right to relief under the non-compete agreements executed by Donahoe."²² It ordered Donahoe to "[a]bide by all terms of the noncompete agreements for their duration."²³ But it is doubtful that ChemStation has a clear legal or equitable right under either noncompete agreement that supports the scope of the injunction granted by the trial court.

The 2004 Noncompete Agreement

The 2004 noncompete agreement between Donahoe and ChemStation imposes a 12-month noncompete period following termination of employment and specifically limits soliciting, diverting, or appropriating any business to a competitor of ChemStation, including any accounts that had been assigned to the employee.²⁴ The dispositive issue is whether the 2004 noncompete agreement is supported by adequate consideration.

In Labriola v. Pollard Group, Inc., our Supreme Court held that if an employee signs a covenant not to compete after he or she begins employment,

²¹ Id. at 721.

²² CP at 1098.

²³ Id. at 1099.

²⁴ This noncompete agreement expired on March 29, 2018, so the issue of its enforceability is likely moot. Even so, we address the merits of Donahoe's argument.

continued at-will employment cannot serve as consideration for the agreement.²⁵ Rather, "independent consideration is required at the time promises are made for a noncompete agreement when employment has already commenced."²⁶

Here, the 2004 noncompete agreement is not supported by independent consideration. ChemStation argues that Donahoe's promotion and additional compensation in March 2004 served as sufficient independent consideration. But there is no evidence in the record that his promotion was contingent on his later execution of the noncompete agreement. When he signed the noncompete agreement in July 2004, he already had the benefit of the promotion. There is no evidence that he received any independent consideration to support the noncompete agreement. ChemStation failed to show that it was likely to succeed in enforcing the 2004 noncompete agreement, and the trial court abused its discretion in basing the preliminary injunction on this agreement.

The 1999 Noncompete Agreement

The next issue is the trial court's determination that ChemStation is likely to prevail on its claim that Donahoe is bound by the 1999 noncompete agreement. That agreement states, "In the event of termination of my employment, I will refrain from competing with the company for a period of 24 months."²⁷ There is no geographical limitation.

²⁵ 152 Wn.2d 828, 836, 100 P.3d 791 (2004).

²⁶ *Id.* at 838.

²⁷ CP at 535. The 24-month noncompete period will expire on March 29, 2019.

In Washington, where a restriction is unreasonable, the court may exercise its equitable powers to rewrite it "to the extent necessary to accomplish the basic purpose of the contract insofar as such contract is reasonable."²⁸

Unlike the 2004 noncompete agreement, the 1999 noncompete agreement is supported by consideration because it was signed at the start of Donahoe's employment. The critical issue is whether it imposes on Donahoe a greater restraint than is reasonably necessary to secure ChemStation's business or goodwill, and whether the trial court should have rewritten the 1999 noncompete agreement to impose a reasonable geographic limitation.

As stated in its title, the 1999 noncompete agreement is between Donahoe and ChemStation International. Therefore, the requirement that Donahoe refrain from competing with "the company" refers to ChemStation International. Because the preliminary injunction requires Donahoe to "abide by all terms of the noncompete agreements for their duration,"²⁹ and the preliminary injunction contains no geographic limitation, it extends to anywhere in the world where ChemStation International does business.

ChemStation argues that it only sought to limit Donahoe's competition within the Pacific Northwest to a specific group of nine existing competitors. But the preliminary injunction does not contain such a limitation. We cannot interpret the preliminary injunction as containing any geographic limitation.

²⁸ Wood v. May, 73 Wn.2d 307, 313-14, 73 Wn.2d 307 (1968); Sheppard v. Blackstock Lumber Co., 85 Wn.2d 929, 934, 540 P.2d 1373 (1975).

It is true that a geographic limitation is less important in certain circumstances, such as when the covenant protects a niche business with narrow prospects.³⁰ But here, there is nothing in the record that supports a worldwide ban on Donahoe's employment anywhere ChemStation International is engaged in business. On this record, ChemStation failed to establish that it is likely to succeed in obtaining a permanent injunction, lacking a reasonable geographic limitation. Therefore, the evidence in the record does not support the preliminary injunction as it is currently written. It was an abuse of discretion to grant a preliminary injunction with no geographical limitation.

We recognize that Donahoe has already been subject to a worldwide limitation on his ability to obtain any employment in competition with ChemStation International for more than 16 months of the applicable 24-month period. Although the reasonableness analysis frequently evaluates the time component separately from the geographic component, it is the combined impact of both that is of

²⁹ CP at 1099.

³⁰ See Organo Gold Int'l, Inc. v. Ventura, 2016 WL 1756636, at *7 (W.D. Wash. 2016) (lack of a geographic restriction was not overly broad where the noncompete effectively prohibited the former employee from selling competitive ganoderma-based products, a very specific venture, and the noncompete was not an outright prohibition on the employee's ability to make a living); ALTA Analytics, Inc. v. Muuss, 75 F. Supp. 2d 773, 784 (S.D. Ohio 1999) (lack of a geographic limitation was not unreasonable in small niche industry where former employee would be prevented from working for one company and its distributor but was not foreclosed from working for other companies in the area); Am. Software USA, Inc. v. Moore, 264 Ga. 480, 481, 448 S.E.2d 206 (1994) (recognizing that if the group of customers the employer wishes to protect from solicitation is narrow, the need for a territorial restrictions is less important).

consequence.³¹ If ChemStation pursues a renewed preliminary injunction on remand, the trial court's consideration of the likelihood of ChemStation's success on the reasonableness of the 1999 noncompete should include the impact of the limitations Donahoe has already been subjected to.

Donahoe argues ChemStation is also unlikely to succeed on its claim he breached the 1999 noncompete agreement because it was not a party to that agreement. As noted above, the 1999 noncompete agreement was between Donahoe and ChemStation International. But this argument was not raised before the trial court, and the trial court did not have the benefit of argument or briefing on any impact of the franchisor-franchisee relationship, any third-party beneficiary theory, or any application of the "successor or assign" provision in the 1999 agreement. Therefore, we decline to consider this argument raised for the first time on appeal.³²

UTSA Claim

Donahoe argues ChemStation did not demonstrate it is likely to succeed on its UTSA claim. On the existing record and findings, we agree.

³¹ See, e.g., Armstrong v. Taco Time Int'l, Inc., 30 Wn. App. 538, 544-45, 635 P.2d 1114 (1981) (rewriting both the temporal and geographic restrictions of a covenant); Emerick, 189 Wn. App. at 725-28 (also rewriting the temporal and geographic restrictions of a covenant)

³² RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.") Donohue does not provide persuasive authority that this question qualifies as a failure to establish facts upon which relief can be granted. RAP 2.5(a)(2).

The UTSA “codifies the basic principles of common-law trade secret protection” by which a plaintiff can receive damages for the misappropriation of trade secrets.³³ “A plaintiff seeking to establish a trade secrets claim under the uniform act has the burden of proving that legally protectable secrets exist.”³⁴

RCW 19.108.010(4) defines a “trade secret” as

information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

“Thus, in order to have a legally protectable interest in trade information, a party must establish (1) that the information derives independent economic value from not being generally known or readily ascertainable to others who can obtain economic value from knowledge of its use and (2) that reasonable efforts have been taken to maintain the secrecy of the information.”³⁵ “While the definition of a trade secret is a matter of law under the Uniform Trade Secrets Act,

³³ Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 438, 971 P.2d 936 (1999).

³⁴ Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 49, 738 P.2d 665 (1987).

³⁵ Precision Moulding & Frame, Inc. v. Simpson Door Co., 77 Wn. App. 20, 25, 888 P.2d 1239 (1995).

RCW 19.108.010(4), the determination in a given case whether specific information is a trade secret is a factual question.”³⁶

When granting a preliminary injunction, a trial court must abide by CR 65(d):

Every order granting an injunction and every restraining order 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.

And CR 52(a)(2)(A) also requires findings of fact for a temporary injunction.³⁷

Here, the trial court’s “findings and conclusions” state, “ChemStation has shown a substantial likelihood that legally protectable trade secrets exist, and that Donahoe has misappropriated and will continue to misappropriate trade secrets if not enjoined.”³⁸ It then enjoins Donahoe from “[d]irectly or indirectly using, disclosing, copying or transmitting” the “trade secret information” or allowing other unauthorized persons to do the same.³⁹

But neither the “findings and conclusions” nor the ordering clauses identify what those trade secrets are. The lack of specificity as to the trade secrets violates the CR 65(d) requirement that a preliminary injunction “shall be specific in terms.” Meaningful review of the likelihood of success on a trade secret claim is

³⁶ Ed Nowogroski Ins., Inc., 137 Wn.2d at 436.

³⁷ CR 52(a)(2) (“findings and conclusions are required [for]: (A) Temporary Injunctions. In granting or refusing temporary injunctions.”).

³⁸ CP at 1098.

³⁹ Id. at 1099.

impossible where the trial court makes no findings identifying the trade secrets at issue.

In its motion for preliminary injunction, ChemStation provided the trial court with a laundry list of possible trade secrets and offered argument on only two or three specific alleged trade secrets.⁴⁰ Donahoe vigorously argued that the elements for establishing a trade secret were not satisfied.⁴¹

On this record, specific findings of fact are especially important to analyze whether there are likely any legally protectable trade secrets.⁴² And absent some identification of the trade secrets relied on by the trial court, Donohue has no way to know the acts that have been restrained, as required by CR 65(d). The lack of adequate findings consistent with the requirements of CR 65(d) and CR 52(a)(2)(A) identifying the trade secrets frustrates our review of the preliminary injunction as to trade secrets. We reverse.

⁴⁰ See CP at 443-44. General trade secrets were identified as “pricing information, profit margin, product formulation, vendor pricing, customer proposals, account strategies, customer preference, customer lists, and product development.” *Id.* at 443. Specifically identified trade secrets included contact information for Ellenos Yogurts, a tank placement form, and a schedule of all deliveries made in March (which included customer and product delivery information). *Id.* at 443-44.

⁴¹ See CP at 662-63, 675 (Donahue argued that ChemStation did not take reasonable efforts to maintain the secrecy of the disputed information, had no proprietary formulation or pricing data, and that the information was generally known or readily ascertainable from other sources).

⁴² The parties’ oral arguments to the trial court are not before us.

CONCLUSION

Because the trial court did not enter adequate factual findings to support the preliminary injunction, we reverse and remand for further proceedings consistent with this opinion, including entry of additional findings on the existing record if ChemStation seeks any renewed preliminary injunction.

Furthermore, on the existing record, the 2004 noncompete agreement is not supported by independent consideration, and the 1999 noncompete agreement is not reasonable as written as it lacks any geographic limitation. On remand, any renewed preliminary injunction may not be based on the 2004 agreement. And if it is based on the 1999 noncompete agreement, the trial court must determine and include a reasonable geographic limitation. Additionally, any preliminary injunction issued on remand must identify the trade secrets in accordance with CR 65(d) and CR 52(a)(2)(A).

WE CONCUR:

Mam. A.C.T.

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