

FILED

AUG 23 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297667

COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

EVERGREEN MONEYSOURCE MORTGAGE COMPANY d/b/a EVERGREEN HOME
LOANS, a Washington corporation,

APPELLANT,

v.

LARRY SHANNON AND JANE DOE SHANNON, husband and wife; and GUILD
MORTGAGE COMPANY, a California corporation,

RESPONDENTS.

APPELLANT'S REPLY TO RESPONDENT GUILD'S BRIEF

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I. INTRODUCTION

Similar to Defendant Larry and Jane Doe Shannon's (hereinafter "Shannon") Respondent's Brief, Guild Mortgage Company's (hereinafter "Guild") Respondent's Brief is replete with unsupported and inaccurate *statements of fact*. In short, it was an error for the trial court to dismiss all of Evergreen's claims on Summary Judgment.

It is also noteworthy that the trial court misinterpreted procedural principles while dismissing Evergreen's lawsuit. Indeed, as noted in Evergreen's Appellant's (Opening) Brief, the trial court improperly dismissed claims and denied relief without regard to the substance of those claims (i.e. improper disclosure of Evergreen's confidential business information and the denial of the Motion to Amend Complaint). Evergreen was denied its "day in court."

Reading between the lines of the situation at hand, it is apparent that Charles Nay of Guild was not concerned about his conduct or the unlawful disclosure and use of Evergreen's confidential business information until it later became an issue; Nay probably thought that he would never get caught. Indeed, Guild has failed to present a compelling defense to any of Evergreen's claims.

Guild argues that it did not intend or knowingly solicit Evergreen's employees. Guild's argument defies common sense. Guild asked for and

received Evergreen's proprietary business information, including Evergreen's loan originator agreements. Guild used the information to lure the employees. Also, Guild ignores that Nay spent months speaking with Shannon about working out a "package deal" to bring over Evergreen's entire Moses Lake Branch to Guild.

Guild's response to Evergreen's claim that Guild improperly closed loans with Evergreen's customers focuses on Guild's apparent ignorance of Shannon's actions. However, Guild cannot "bury its head in the sand" to avoid liability. Guild overlooks the evidence that it was Evergreen's customers who closed their loans with Guild. Indeed, Evergreen's customers are found in both Evergreen's and Guild's pipeline reports. Guild's representatives also communicated with Shannon about transferring Evergreen's customers' files prior to the Moses Lake Branch's affiliation with Guild.

Additionally, Guild violated the Washington Consumer Protection Act (hereinafter "CPA"). Since Guild misappropriated customers, employees and confidential business information from Evergreen, it could replicate the same behavior when recruiting another branch. Guild's anti-competitive actions impact the public interest.

Lastly, Guild failed to show it would have been prejudiced if the trial court had granted Evergreen's Motion to Amend the Complaint. A

trial date had not been set and any additional discovery Guild claims that it would have needed was minimal, at best. Evergreen's cause of action for violation of the Washington Trade Secrets Act is not futile; there is evidence that supports the improper disclosure to and use of Evergreen's trade secrets by Guild.

II. GUILD INTERFERED WITH THE CONTRACTUAL AND BUSINESS EXPECTANCY EVERGREEN HAD WITH ITS EMPLOYEES.

A. Guild Used Evergreen's Confidential Business Information To Lure The Moses Lake Branch To Guild.

1. Introduction.

Guild has not raised any genuine issue of material fact regarding its interference with Evergreen's relationship with its employees. In fact, Guild simply ignores or side-steps the irrefutable documentary evidence and testimony by Charles Nay and Larry Shannon which supports Evergreen's cause of action for tortious interference.¹

Contrary to Guild's claim, the evidence shows that Nay requested Evergreen's rates, income information/profit and loss statement and loan originator agreements (or, "comps") from Shannon; Shannon provided him with the information. CP 515 (Shannon Dep. 24:14-25, Sept. 14, 2010); CP 520 (Shannon Dep. 51:1-52:25); CP 519 (Shannon Dep. 42:13-

¹ The arguments in reply to Guild's tortious interference opposition also apply to Shannon.

43:11); CP 564-616; CP 534 (Nay Dep. 28:14-29:4, Sept. 21, 2010) & CP 1142-1145. Guild denies that it used the information. Interestingly, Guild fails to explain the reason for requesting the information it allegedly did not use.

In short, it does not make sense that Guild would request Evergreen's proprietary business information from Shannon without intending to use the information to assist in usurping one of Evergreen's most profitable branch offices. In fact, Shannon testified at his deposition that the information was provided to Nay for negotiation purposes. CP 516 (Shannon Dep. 24:14-25) & CP 520 (Shannon Dep. 52:6-12). For instance, when Shannon was asked about why Evergreen's loan originator agreement form was sent to Nay, he testified as follows:

- Q: What was the purpose of providing the loan "comp" information to Mr. Nay?
A: To make sure that my loan officers had comparable compensation plans.
Q: So it was for purposes of – was it for purposes of negotiating their employment contract?
A: Yes.

CP 520 (Shannon Dep. 52:6-12).

2. Guild Used Evergreen's Proprietary Business Information To Lure The Moses Lake Branch to Guild.

Nay admitted that he used the loan originator agreement information to lure Evergreen's employees to Guild. Again, Nay asked

Shannon for the loan originator compensation plans in an e-mail to Shannon. CP 1142-1145. In response, Shannon sent another e-mail with the loan originator agreement attached. CP 565-599.

Nay testified at his deposition that he wanted the loan originator agreement to ensure that the compensation at Guild was comparable to the compensation at Evergreen. CP 534 (Nay Dep. 28:14-29:4). In other words, Nay wanted to make sure it was a good deal for the employees of the Moses Lake Branch to move to Guild. CP 534 (Nay Dep. 28:14-29:4).

Guild's only defense to the e-mails and deposition testimony is a self-serving declaration in which Nay denies that he used any of the information provided to him by Shannon. The testimonial inconsistency undermines his credibility and Guild's defense. Indeed, Guild solely relies on these denials which contradict Nay's and Shannon's deposition testimony, and other documentary evidence in the case. CP 516 (Shannon Dep. 24:14-25); CP 520 (Shannon Dep. 52:6-12); CP 534 (Nay Dep. 28:14-29:4); CP 564-599; CP 601-617 & CP 1142-1145.

As noted in the Appellant's (Opening) Brief, on February 18, 2009, and February 19, 2009, e-mails between Nay and Shannon established that Shannon provided the profit and loss statement to Nay and Nay sent back pro forma reports in response. CP 564-599 & 658-663. Based on those communications, there is only one conclusion that can be

drawn; Nay created pro forma reports from Evergreen's profit and loss statement to show that Shannon and other employees would be as productive at Guild as they were at Evergreen. CP 515 (Shannon Dep. 24:14-25); CP 516 (Shannon Dep. 26:1-29:24); CP 564-599 & 658-663.

3. Guild Knew That The Information Was Confidential.

Guild's argument that it did not know Evergreen's profit and loss statement, rate sheet and loan originator agreement was confidential is unsupported. Again, it does not make sense that Nay would not have known about the confidential nature of the information because he had access to the loan originator agreement used by Evergreen. CP 601-610. The confidentiality paragraph is set out under the bold letters "CONFIDENTIALITY." CP 603.

As noted in the Appellant's (Opening) Brief, the prohibition regarding the disclosure of Evergreen's confidential information is found on the same page as the last few sentences of the compensation terms. CP 602-603. Again, Nay testified that he used the loan originator agreement to ensure that employees would receive comparable compensation with Guild. CP 534 (Nay Dep. 28:14-29:4). It is doubtful that Nay overlooked the "CONFIDENTIALITY" provision on the same page as the compensation terms. CP 602-603.

It is also noteworthy that Guild also has its own policies about keeping its business information confidential from third parties. CP 533 (Nay Dep. 23:1-12) & CP 666-668. Indeed, Guild's policies contain provisions regarding the confidentiality of business information. CP 666-668. Specifically, Guild's policy provides that "[a]ll communications sent must comply with this and other company policies and may not disclose any confidential or proprietary information to an unauthorized third party." CP 668.

Significantly, based on his own work experience with another company, Nay testified that it was imperative to protect a customer's data from being disclosed to unauthorized sources (e.g. a competing company). CP 533 (Nay Dep. 24:20-25:15). Again, despite his knowledge of the importance of keeping business information confidential, Nay requested that Shannon provide him with Evergreen's business information. CP 517 (Shannon Dep. 30:20-31:12); CP 519 (Shannon Dep. 42:13-43:11); CP 520 (Shannon Dep. 51:1-52:25) & CP 1142-1145.

B. Evergreen Had A Valid Business Expectancy To The Continued Employment Of Its Employees.

Without support, Guild asserts that Washington courts do not recognize a business expectation for to at-will employees. Indeed, Guild misconstrues the decision in *National City Bank v. Prime Lending, Inc.*,

2010 WL 2854247 (2010). In that case, the plaintiffs brought both a tortious interference with contractual relations and tortious interference with business expectancy cause of action for their former at-will employees. *Id.* at 5. The court determined that because the plaintiffs had valid contracts with their former at-will employees there was no need to determine whether there was a business expectancy. *Id.* In other words, the business expectancy issue was not decided by the court. *Id.*

Again, as noted in the Appellant's (Opening) Brief, an employer can have a valid business expectancy with respect to its at-will employees. *See* Appellant's (Opening) Brief, pp. 25-26. Accordingly, as a matter of law, Evergreen's expectation was valid; Guild interfered with that expectation by luring the Moses Lake Branch to Guild.

Moreover, Guild's argument that it did not "knowingly" interfere with Evergreen's business expectancy is absurd. Guild knew it was talking to employees that, in most cases, were under contract with Evergreen. Again, Nay had a loan originator agreement in hand while he and Shannon were discussing a "package deal" for the Moses Lake Branch. CP 520 (Shannon Dep. 51:1-52:23). Ultimately, Nay knew he was talking to an Evergreen branch office about a move to Guild.

C. The Employees Had Not Decided To Terminate Their Affiliation With Evergreen Before Talking To Guild.

Contrary to Guild's argument, the Moses Lake Branch had not decided to terminate its affiliation with Evergreen before Shannon began speaking to Nay about affiliating with Guild. Again, it is undisputed that Shannon contacted Guild in February of 2009. In the Second Declaration of Clark Schweigert, a loan originator at the Moses Lake Branch, he stated that he did not decide to leave Evergreen until "after listening to Keith Frachiseur in early April 2009." CP 788.

Accordingly, branch employees had not decided to move to Guild until April of 2009, approximately two months after Shannon began speaking with Nay in February of 2009. Ultimately again, Guild relies on misstatements of fact to defend its position.

III. GUILD INTERFERRED WITH EVERGREEN'S CONTRACTUAL AND BUSINESS EXPECTANCY WITH ITS CUSTOMERS.

A. Guild Failed To Address The Evidence That It Usurped Evergreen's Customers.

Guild argues that Evergreen did not have a business or contractual expectancy with regard to its customers; the argument is absurd. Evergreen expected that its customers would close their loans with Evergreen, and Guild knew about Evergreen's expectation. Indeed, Shannon and the other loan originators agreed to work exclusively for

Evergreen. CP 550 & CP 601. Again, Guild had in its possession Evergreen's loan originator agreement which clearly stated the relationship was exclusive and that Evergreen had exclusive rights to its customers. CP 520 (Shannon Dep. 51:1-52:23) & CP 600-610.

Ultimately, it defies common sense to state that Evergreen did not have an expectation of closing the loans of its customers. Obviously, Evergreen profits from closing loans with its customers.

Also, Guild did not respond to the fact that it apparently helped move loan files into Guild's system while Shannon was still working for Evergreen. It is undisputed that Shannon's last day with Evergreen was April 30, 2009. In an April 22, 2009, e-mail Shannon stated to several Guild employees:

Currently, we have about 50 or 60 files that we need to get into the system. We need to close between 25 and 30 of these files in May. We are starting to have issues with borrowers and realtors and need to move forward as soon as we can.

CP 618.

Guild does not address that Evergreen's customers showed up on Guild's pipeline reports. CP 621-662. In fact, Guild baldly asserts that there is no evidence that these individuals were Evergreen's "customers." Practically speaking, there is no other reason why a borrower would appear on Evergreen's pipeline report unless the borrower was

Evergreen's customer. Indeed, when asked about the presence of duplicate borrowers on the pipeline reports for both companies, Rita Nicholas (hereinafter "Nicholas"), a loan processor at the Moses Lake Branch, stated the following:

Q: So there might be loans that – for customers who were Evergreen customers that closed at Guild.

Mr. Daley: Object to the form.

A: Is it possible?

Q: (By Mr. Hecker) Well, it looks like it's probable. It looks like it happened; right?

A: Correct.

CP 548 (Nicholas Dep. 50:1-7, Sept. 15, 2010).

B. Guild Knew It Was Closing Loans With Evergreen's Customers.

Guild's primary defense appears to be that it did not "know" of Shannon's unlawful actions with respect to Evergreen's customers. However, Guild cannot "look the other way" and say it never knew it was improperly closing loans with Evergreen's customers. Indeed, the law creates an expectation that customer information of a former employer will be kept confidential and not be used by former employees/current employers to gain a competitive advantage. *See Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 439, 971 P.2d 936 (1999) (citation omitted); *see also Thola v. Henschell*, 140 Wn. App. 70, 77 & 79, 164 P.3d 524 (2007). Guild used the information to a competitive advantage when it knowingly

uploaded Evergreen's customers' loans into its system (as shown by the April 22, 2009, e-mail) and closed those loans (as shown in the pipeline reports). CP 618 & CP 621-662.²

C. Guild Acted Through "Improper Means."

Guild's argument that it did not act through "improper means" in soliciting employees and in improperly closing loans with Evergreen's customers is without merit. Nay's request, receipt and use of Evergreen's confidential information to lure the employees of the Moses Lake Branch was accomplished through "improper means." Indeed, the unlawful procurement and use of a competitor's confidential business information to obtain a competitive advantage is improper. *See Island Air, Inc. v. Les LaBar d/b/a San Juan Airlines*, 18 Wn. App. 129, 142-144, 566 P.2d 972 (1977).

Furthermore, the cases relied upon by Guild are distinguishable. For instance, in *JKR, LLC* the defendant procured a competitor's pricing information directly from its customers; it then used the information to gain the competitor's customers. *See JKR, LLC v. Linen Rental Supply, Inc.*, 2010 WL 3298775*4. The court found that the defendant did not act with "improper means" because of the source of the information. *Id.*

² Guild mirrors the arguments made in Shannon's Respondent's Brief with respect to the validity of Evergreen's "lost loans" claim. Accordingly, for purposes of brevity, Evergreen incorporates those arguments made in Sections III and IV of the Reply to Shannon's Respondent's Brief as though set forth fully herein.

Unlike the defendant in *JKR, LLC*, Guild acquired Evergreen's confidential pricing information, income information, customer information and loan originator agreement directly from Shannon, an Evergreen employee (i.e. an internal source). Guild has not shown that any of the information it obtained from Shannon is available, as provided, from Evergreen's customers or any other public source.

IV. GUILD'S ANTI-COMPETITIVE CONDUCT VIOLATED THE CONSUMER PROTECTION ACT.

For the most part, Evergreen relies upon the arguments in its Appellant's (Opening) Brief for Guild's violation of the CPA. Fundamentally, Guild's argument that the public interest is not affected defies common sense. Again, Nay received proprietary information from Shannon regarding Evergreen's business. In all cases, Nay asked Shannon for the information. CP 517 (Shannon Dep. 30:20-31:12); CP 519 (Shannon Dep. 42:13-43:11); CP 520 (Shannon Dep. 51:1-52:25) & CP 1142-1145. Nay's anti-competitive actions affect the public interest because they could be replicated when he recruits another branch to Guild.

Moreover, Guild disputes that Evergreen was damaged a result of its actions. Guild's argument overlooks that Evergreen lost its entire branch as a result of Guild's solicitation. Also, Evergreen lost the profits it would have realized from the 17 loans that Shannon improperly

transferred to Guild apparently with Guild's help (i.e. April 22, 2009, e-mail). CP 618.

V. **GUILD WOULD NOT HAVE SUFFERED PREJUDICE IF THE MOTION TO AMEND HAD BEEN GRANTED.**

A. **Guild's Argument That It Would Be Prejudiced By Having To Conduct Additional Discovery Is Without Merit.³**

Guild claims it would have been prejudiced if the Complaint had been amended to add a cause of action for violation of the Washington Trade Secrets Act. Guild argues that it would have been forced to conduct additional discovery. However, Guild overlooks that it possessed the same information that revealed Shannon's improper disclosure of Evergreen's proprietary information at the same time (if not before) Evergreen received the information.

Indeed, it was Guild that turned over the e-mail correspondence to Evergreen which revealed the existence of a potential trade secrets claim vis-à-vis the disclosure of Evergreen's confidential business information to Guild. Accordingly, Guild had knowledge of the misappropriation of Evergreen's trade secrets for months before the Motion to Amend the Complaint was filed. In fact, the claim was brought to Guild's (and

³ Guild joins in Shannon's arguments with respect to the denial of Evergreen's Motion to Amend its Complaint to add a cause of action for violation of the Washington Trade Secrets Act. *See* Guild's Respondent's Brief, p. 19. Accordingly, arguments set out in this section apply to both Shannon and Guild.

Shannon's) attention in an August 20, 2010, letter from Evergreen's counsel. CP 1249-1250.

Moreover, the disclosure of Evergreen's income information, loan originator agreements and rate information was thoroughly investigated in the depositions, the last of which occurred on October 20, 2010 (i.e. Keith Franchiseur's Deposition). CP 914. There should not be any additional discovery needed by Guild.

Even if Guild needed to conduct additional discovery to defend against a cause of action for violation of the Washington Trade Secrets Act, the necessity of additional discovery does not create prejudice. *See Walla v. Johnson*, 50 Wn. App. 879, 884-885, 751 P.2d 334 (1988). The court has the ability to grant a continuance of the trial date to allow for additional discovery. *Id.* Although no trial date had yet been set at the time of Evergreen's Motion to Amend in this case, the trial court could have easily continued the trial setting deadline to allow Guild to conduct any additional discovery.

B. Guild Was Not Prejudiced By Any Delay In Bringing The Motion To Amend Complaint.

Guild provides no support for its argument that Evergreen was obligated to amend its Complaint at the very moment it discovered that Evergreen's proprietary information had been disclosed. Again,

Evergreen originally had this knowledge based on the documents it received through discovery from Guild in February of 2010. However, the mere disclosure of the information by Shannon to Guild does not create a duty to immediately file a cause of action.

Indeed, additional discovery was needed regarding the process, timing and use of the improperly disclosed information. Evergreen first learned that the information had been improperly used through the depositions conducted months later in September and October of 2010. Again, the depositions revealed that Nay had used Evergreen's loan originator agreements and income statements to lure Evergreen's employees to Guild. CP 534 (Nay Dep. 28:14-29:4); CP 564-599 & 658-663; CP 515 (Shannon Dep. 24:14-25); CP 516 (Shannon Dep. 26:1-29:24) & CP 1142-1145.

Also, damages (the loss of the branch) that resulted from the use of Evergreen's "trade secrets" came to light during depositions. Again, Evergreen ultimately lost its entire Moses Lake Branch due to Nay using the information to lure the Moses Lake Branch.⁴

⁴ Note that the timing of the motion near the filing of the Motions for Summary Judgment also does not show prejudice. Indeed, courts have determined that a plaintiff may amend its complaint if it is brought **before** the court enters its written decision on Summary Judgment. *See Tagliani v. Colwell*, 10 Wn. App. 227, 233 (1973) (emphasis added).

C. There Was “Good Cause” To Allow The Motion To Amend To Be Brought After The Scheduling Order Deadline.

There was good cause to allow the Motion to Amend after the expiration of the “amended pleadings” deadline in the scheduling order. The depositions occurred after the deadline to amend the pleadings on May 5, 2010. Again, Evergreen brought its Motion soon after the end of the deposition process approximately 6 months after the expiration of the amended pleadings deadline.

Ultimately, it was an abuse of discretion to deny Evergreen’s Motion to Amend the Complaint based on the dates provided in the scheduling order; the information from the depositions surfaced after that deadline. Again, the deposition testimony was integral in determining that a cause of action for violation of the Washington Trade Secrets Act existed.

D. Evergreen’s Washington Trade Secrets Act Cause Of Action Is Valid.

Guild’s assertion that Evergreen is seeking a futile or unsupported amendment is without merit. To prove a claim for misappropriation of a trade secret under the statute, a plaintiff must show:

- a) A legally protectable trade secret exists;
- b) Defendant misappropriated the trade secret; and
- c) The misappropriation by Defendant caused damage to plaintiff.

See RCW 19.108.010; see also *Thola*, 140 Wn. App. at 76-77.

A “trade secret” is defined as:

[I]nformation, 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.

See RCW 19.108.010(4).

Moreover, “[t]he nature of the employment relationship imposes a duty on employees and former employees not to use or disclose the employer’s trade secrets.” See *Nowogroski Ins.*, 137 Wn.2d at 439. Also, the Trade Secrets Act may be violated vicariously. See *Thola*, 140 Wn. App. at 77 & 79. The vicarious liability can extend to actions of future employees if the future employer “knowingly benefits” from the employees’ unlawful actions. *Id.* at 77.

Again, Guild obtained information regarding Evergreen’s trade secrets through Shannon, who breached his duty to Evergreen. Shannon provided Guild with Evergreen’s valuable confidential business information, such as its profit and loss statement. CP 564-662. The profit and loss statement reveals Evergreen’s methodology in determining its net profits. CP 669-674. Net profits affect compensation for the branch

employees, so the expense deductions are important to employees. CP 669-674. The statement gives a competitor, such as Guild, a convenient snapshot of Evergreen's productivity and how it determines income on a branch-by-branch basis. CP 669-674.

Furthermore, Shannon improperly transferred Evergreen customers to Guild. Customer information is a trade secret if:

- a) The list is a compilation of information;
- b) It is valuable because unknown to others; and
- c) The owner has made reasonable attempts to keep the information secret.

See Nowogroski, 137 Wn.2d at 442. Once information is deemed a "trade secret," the form of the actual trade secret information (i.e. hard copy or memorized) is irrelevant to the analysis of liability under the Act. *Id.* at 450.

As noted, Guild, with Shannon's help, moved borrower files from Evergreen to Guild just before Shannon started working with Guild. CP 618. Shannon did so in violation of his obligations to Evergreen. CP 549-563 & CP 669-674.

Also, Shannon took detailed knowledge of Evergreen's customers with him to Guild and originated loans for those borrowers with Guild. Indeed, Shannon recalled Evergreen's customer's names, the specific loans they applied for at Evergreen, their credit scores, whether they filled

out a loan application and whether their credit score was pulled. CP 523-529 (Shannon Dep., 102:2-129:23).

Again, Shannon first became familiar with the borrowers and their loan needs while at Evergreen. CP 523-529 (Shannon Dep., 102:2-129:23). Given Shannon had apparently familiarized himself with Guild's loan programs before making the change, Shannon could have easily used that knowledge to ensure Evergreen's customers ended up with Guild.

Importantly, Evergreen's income is tied to its borrowers so it is important to keep borrower information confidential, especially from a direct competitor like Guild. CP 669-674. If Evergreen were to disclose its customer information to competitors, it would risk losing the customer and the profits that would have been made from the loan. CP 669-674. Thus, there is value in keeping its income and customer information confidential.

VI. CONCLUSION

As noted above, Guild failed to establish that the trial court's decisions should be affirmed on appeal. The trial court erred in dismissing all of Evergreen's claims and causes of action against Shannon on Summary Judgment. The trial court also erred by denying Evergreen's request for Summary Judgment as to liability.

Further, the trial court erred in denying the Motion to Amend the Complaint. Accordingly, the trial court's decisions should be reversed; for purposes of brevity, Evergreen incorporates the relief requested in its Appellant's (Opening) Brief.

DATED this 22nd day of August, 2011.

A handwritten signature in cursive script, appearing to read "Lindsey Truscott", written over a horizontal line.

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