

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gregg Stark,	:	
	:	
Plaintiff-Appellant,	:	No. 08AP-987
	:	(C.P.C. No. 04CVH12-13708)
v.	:	
	:	
Government Accounting Solutions, Inc.	:	(REGULAR CALENDAR)
et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 30, 2009

Ronald K. Nims, for appellant.

Lawrence Law Office, and *Rodd S. Lawrence*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Gregg Stark, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Government Accounting Solutions, Inc. ("GAS"), Brian E. Bankert, and Doug F. Butscher. Because the trial court did not err in both denying plaintiff's motion to compel discovery and granting defendants' summary judgment motion, we affirm.

I. Procedural History

{¶2} The procedural history of this matter is so intertwined in the issues plaintiff raises on appeal that we address it in some detail. Plaintiff's company, Governmental Systems, originally employed both Bankert and Butscher. According to the complaint, Governmental Systems provides to Ohio municipal corporations a variety of data processing services, including computer programs and training for utility billings, payroll, income tax, fund accounting, and annual reports to the state. As part of its business, Governmental Systems developed not only its own computer source codes and related software but also its customer lists. After working for plaintiff from 1980 and 1986, respectively, Bankert and Butscher in 2004 started their own business, GAS. Like plaintiff's company, GAS offers computer software aimed at the needs of Ohio municipal corporations. As a result of the competition from GAS, plaintiff filed a complaint against defendants on December 30, 2004, alleging misappropriation of plaintiff's proprietary and trade secret information, unfair competition and unfair trade practices, and civil conspiracy.

{¶3} After the trial court denied defendants' motion to dismiss pursuant to Civ.R. 12(B)(6), defendants filed an answer and counterclaim on August 16, 2005. Plaintiff countered with a motion for a default judgment on August 24, 2005, and defendants filed a motion for partial summary judgment the next day. The trial court denied both motions.

{¶4} In and around the time the parties' motions were pending, the parties began what ultimately became a discovery logjam. Defendants served discovery requests on plaintiff on October 19, 2005; asserting plaintiff failed to respond, defendants filed a

motion to compel discovery on February 17, 2006. Plaintiff, in turn, served discovery requests on defendants on March 26, 2006; contending defendants failed to adequately respond, plaintiff filed a motion to compel discovery on July 31, 2006.

{¶5} The main issue in the discovery dispute concerned the computer source code defendants utilized: plaintiff alleged defendants were using plaintiff's own source code or, alternatively, had developed their source code while still in plaintiff's employ. Despite the controversy, plaintiff did not oppose defendants' motion to compel discovery, and upon defendants' averring they made reasonable efforts to resolve the dispute pursuant to Civ.R. 37(E), the trial court granted defendants' motion on March 10, 2006.

{¶6} On the same day plaintiff filed his motion to compel discovery, defendants filed a motion seeking summary judgment on three of the four counts of plaintiff's complaint, as well as reconsideration of their earlier denied motion for partial summary judgment that addressed the remaining count of the complaint. Defendants followed their summary judgment motion with an August 15, 2006 motion for a protective order and a memorandum opposing plaintiff's motion to compel. Plaintiff responded on August 28, 2006 with a motion for leave to file an untimely memorandum opposing defendants' summary judgment motion. On that same day, plaintiff also filed a memorandum opposing defendants' motion for a protective order and a reply to defendants' memorandum opposing plaintiff's motion to compel.

{¶7} Apparently unaware of plaintiff's August 28, 2006 filing, the trial court on August 30, 2006 issued a decision granting summary judgment to defendants on all counts of plaintiff's complaint. Plaintiff responded on September 12, 2006 with a motion

for reconsideration or, alternatively, a motion for relief from judgment under Civ.R. 60(B). After defendants voluntarily dismissed their counterclaims on September 18, 2006, the trial court by judgment entry filed September 29, 2006, entered judgment for defendants on all the claims in plaintiff's complaint. Plaintiff filed a notice of appeal from the trial court's August 30, 2006 decision, but this court remanded the matter so the trial court could consider plaintiff's motion seeking relief from judgment.

{¶8} On remand, the trial court on November 16, 2006 ordered an evidentiary hearing before a magistrate of the court. Defendants filed a memorandum opposing plaintiff's Civ.R. 60(B) motion on December 4, 2006; plaintiff filed a reply memorandum on December 11, 2006. When it originally granted defendants' summary judgment motion, the trial court noted the motion was unopposed for lack of a timely response from plaintiff. In considering plaintiff's motion seeking relief from that judgment, the trial court agreed with the magistrate's conclusion that plaintiff's failure to file on time constituted excusable neglect. Accordingly, the trial court adopted in full the magistrate's decision on January 2, 2007 and vacated its September 29, 2006 judgment granting defendants' motion for summary judgment.

{¶9} Plaintiff then filed a motion to reinstate the case and a request for pretrial hearings or a status conference. In his motion, plaintiff pointed to the discovery problems plaguing the case and specifically referenced plaintiff's July 31, 2006 motion to compel discovery and defendants' motion for a protective order filed in response on August 15, 2006. Defendants responded with a memorandum not contesting reinstatement but arguing the trial court decision to vacate the summary judgment granted to defendants left

defendants' motion for summary judgment once again pending before the court. Since the trial court vacated its prior judgment in order to consider plaintiff's response to defendants' summary judgment motion, defendants urged the court to revisit their motion after examining plaintiff's memorandum opposing it.

{¶10} By order of reference journalized on May 14, 2007, the trial court referred the matter to a magistrate for a status conference on June 5; a second status conference was scheduled. In a telephone conference with the parties, the magistrate offered them all the opportunity to suggest a procedure to alleviate the discovery stalemate. The parties' filings in response to the offer appear to have accomplished nothing.

{¶11} With the parties' inability to resolve the discovery impasse, the trial court on May 8, 2008 issued a decision denying plaintiff's motion to compel discovery. After considering plaintiff's memorandum contesting defendants' summary judgment motion and the evidence presented in support of the motion, the trial court on October 9, 2008 reaffirmed its decision to grant summary judgment to defendants. By a judgment entry filed October 20, 2008, the trial court rendered judgment to defendants on all of plaintiff's claims.

II. Assignments of Error

{¶12} Plaintiff appeals, assigning two errors:

ASSIGNMENT OF ERROR NO. 1:

The Trial Court erred in denying Plaintiff/Appellant's Motion to Compel Discovery in that there was insufficient reasoning stated by the Trial Court in its denial, and that material issues in Plaintiff/Appellant's Motion to Compel Discovery were not considered or ruled on by the Trial Court.

ASSIGNMENT OF ERROR NO. 2:

The Trial Court erred in reaffirming its ruling on the Motion for Summary Judgment when the original motion for summary judgment had been vacated pursuant to rule 60(b)5 [sic] by the Magistrate and such order was affirmed by the Trial Court, when there was ample evidence in the record concerning issues of material fact, and the Trial Court had thwarted Plaintiff/Appellant's discovery necessary to develop his case.

III. First Assignment of Error

{¶13} Plaintiff's first assignment of error contends the trial court failed to provide sufficient justification for denying his motion to compel discovery. As a result, plaintiff asserts, the trial court failed to consider or resolve material issues raised in plaintiff's motion. In its May 8, 2008 decision, the trial court found "the scope of plaintiff's discovery requests" were "too broad given the nebulous and imprecise nature" of his claims. Based on that finding, the parties' inability to agree on an appropriate way to compare the computer programs at issue, and the trial court's inability to appoint a master to resolve the dispute, the trial court denied plaintiff's motion to compel discovery.

{¶14} A trial court enjoys broad discretion in the regulation of discovery, and an appellate court will not reverse a trial court's decision to sustain or overrule a motion to compel discovery absent an abuse of discretion. *Coryell v. Bank One Trust Co. N.A.*, 10th Dist. No. 07AP-766, 2008-Ohio-2698, ¶47, citing *513 E. Rich St. Co. v. McGreevy*, 10th Dist. No. 02AP-1207, 2003-Ohio-2487, ¶10. Under this standard of review, we must affirm the trial court's action absent a showing that the trial court acted unreasonably, unconscionably or arbitrarily. *Id.*, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶15} Plaintiff initially contends that because the trial court acknowledged a plaintiff is entitled to conduct discovery to develop its case, the trial court erred in failing to order discovery from defendants. In its decision, the trial court noted the efforts the magistrate made to resolve the discovery dispute between the parties. The magistrate concluded plaintiff's discovery requests were too broad, and the magistrate then provided plaintiff the opportunity to narrow or restrict his requests. While plaintiff filed a response to the magistrate's offer, the trial court stated "the discovery devices remained unaltered in terms of the scope of the information sought to be obtained" from defendants. (May 8, 2008 Decision Denying Plaintiff's Motion to Compel Discovery, 1.) Because plaintiff failed to cooperate with the magistrate's request that he narrow or restrict his discovery requests, the trial court did not abuse its discretion in denying plaintiff's motion to compel.

{¶16} Additionally, plaintiff argues the trial court focused only on his requests for computer source codes and neglected to rule on his other discovery requests, such as his requests for defendants' business records. In addition to information about defendants' computer source codes, plaintiff's discovery requests sought information about defendants' interactions with all of their customers, including the terms, nature, and fees for services rendered. Plaintiff also requested information about the vendors and suppliers defendants utilized, including the dates of all orders, the nature and quantities of products ordered, and the name of the contact person for each vendor and supplier. The broad nature of these requests ties plaintiff's second contention to his first and illustrates why the magistrate asked plaintiff to resubmit narrower, more focused discovery requests. Because plaintiff failed to narrow his discovery requests, the trial court acted within its

discretion when it denied plaintiff's motion to compel discovery of matters outside the computer source codes.

{¶17} Finally, plaintiff argues the trial court erred by not providing legal authority for its finding that a special master could not be appointed to oversee discovery in this case. The trial court's decision specifically referenced Fed.Civ.R. 53, which allows a federal court to appoint a master to "address pretrial * * * matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." No corollary to the federal procedural rule exists in the Ohio Rules of Civil Procedure. Indeed, plaintiff cites no legal authority supporting his suggestion that a common pleas court may appoint a special master to resolve a discovery dispute.

{¶18} Even though the trial court determined it could not appoint a special master, the court referred the matter to a magistrate who, in effect, attempted to resolve the discovery matter with efforts similar to those a master may have employed. Plaintiff nonetheless failed to conform to the magistrate's instructions, suggesting a master's intervention would have been no more fruitful. Because plaintiff's failure to obtain discovery is the result of his own failure to revise his requests, the trial court's decision not to appoint a master, in the end, did not prejudice plaintiff.

{¶19} Plaintiff's first assignment of error is overruled.

IV. Second Assignment of Error

{¶20} Plaintiff's second assignment of error maintains the trial court erred in reaffirming its ruling on defendant's summary judgment motion after the trial court vacated the original grant of summary judgment. Plaintiff premises his argument on three points:

(1) the record contains ample evidence demonstrating issues of material fact; (2) defendants' motion for summary judgment was filed out of rule; and (3) the trial court thwarted plaintiff's attempts to conduct the discovery necessary to develop his case.

{¶21} An appellate court's review of summary judgment is conducted de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. We apply the same standard as the trial court and conduct an independent review without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107, *Brown*, supra, at 711. We must affirm the trial court's judgment if any of the grounds the movant raised in the trial court support the judgment. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶22} Summary judgment is appropriate only where (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 66. A party seeking summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving

party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*

{¶23} If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Id.* However, once the moving party discharges its initial burden, the nonmoving party bears the burden of offering specific facts demonstrating a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Id.*; Civ.R. 56(E).

{¶24} According to plaintiff's first argument, the trial court should not have granted summary judgment in this case, "as all of the material facts in this case remain to be litigated." (Plaintiff's brief, 29.) Contrary to plaintiff's contentions, defendants, as the moving party, met their burden of demonstrating that no genuine issue of material fact existed. Because plaintiff failed to respond by pointing to or submitting evidence demonstrating a genuine issue of material fact existed for trial, the trial court appropriately rendered summary judgment in defendants favor.

{¶25} The first count of plaintiff's complaint alleges that defendants misappropriated plaintiff's proprietary and trade secret information, in violation of R.C. 1333.61. The second count asserts defendants' actions in forming and naming their company constituted unfair competition and unfair trade practices, because defendants misled plaintiff's existing and prospective customers to believe they were doing business with plaintiff, not defendants. According to the third count of plaintiff's complaint,

defendants unlawfully used plaintiff's trade secrets through mass mailings to all of the customers on plaintiff's customer list. Finally, the fourth count of the complaint alleges defendants planned and conspired to misappropriate plaintiff's trade secrets before terminating their employment with plaintiff's company.

{¶26} The four counts collectively raise two issues: (1) whether defendants misappropriated trade secrets and proprietary information from plaintiff; and (2) whether the name defendants gave to their company constitutes unfair competition and an unfair business practice?

A. Misappropriation of Trade Secret

{¶27} In order to prevail on his misappropriation claims, plaintiff must satisfy the elements of R.C. 1333.61. The statute, which establishes the tort of misappropriation of a trade secret, defines a trade secret as information that both (1) "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 (2) "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D).

{¶28} With regard to plaintiff's claim that defendants misappropriated his customer list, defendants pointed out that the list consists of names and contact information for Ohio public government entities, information available on the website of the Ohio Secretary of State. In his affidavit, Butscher stated defendants' customer list was created by utilizing the information obtained from the Secretary of State's website. Unlike a trade

secret, the information thus is generally known and readily ascertainable by reasonable means.

{¶29} Defendants also pointed out that the customer interface of plaintiff's computer program was not unique in the government utility billing industry. In particular, defendants noted the accounting principles used were uniform across the industry, and the computer screens and billing statements utilized and produced in the industry share similar appearances. In addition, defendants stated plaintiff failed to protect the secrecy of his computer program, as it was not marked confidential, no written policy restricted its use, and customers were allowed access to the underlying source code.

{¶30} Perhaps most significantly, defendants introduced evidence showing that their computer programs rely on a Microsoft Access database, rather than the random-access and sequential data files plaintiff's source code utilized. Butscher's affidavit detailed the differences in operation between the two programs, noting the systems "function differently, create different types of reports and, most importantly, access the data input of the governmental entity differently." (Butscher affidavit, 4.) Defendants' evidence, if not rebutted, demonstrates that no genuine issue of material fact exists, because the different computer data source defendants utilized did not allow them to rely upon any information programming codes and language from plaintiff's program.

{¶31} In response, plaintiff presented no evidence to demonstrate a genuine issue of material fact. While plaintiff attached his personal affidavit to his memorandum opposing defendants' summary judgment motion, his affidavit did not offer specific facts to demonstrate a genuine issue for trial, but merely restated the allegations in his

complaint. Since plaintiff failed to respond with evidence creating a genuine issue of material fact after defendants met their burden of showing the absence of any genuine issue of material fact, the trial court properly granted summary judgment in favor of defendants on counts one, three, and four of plaintiff's complaint that were premised on violation of R.C.1333.61.

B. Unfair Competition and Unfair Business Practices

{¶32} Similarly, plaintiff failed to demonstrate a genuine issue of material fact regarding the second count of his complaint that alleged defendants engaged in unfair competition and unfair business practices when they named their company "Government Accounting Solutions." Plaintiff alleged the similarity between Government Accounting Solutions and the name of plaintiff's company, Governmental Systems, confused customers and led them to believe they were dealing with plaintiff when instead they were contracting with defendants. Relying upon *Leventhal & Assoc., Inc. v. Thomson Cent. Ohio* (1998), 128 Ohio App.3d 188, and *Jewel Cos., Inc. v. Westhall Co.* (N.D.Ohio 1976), 413 F.Supp. 994, aff'd (C.A.6, 1978), 575 F.2d 1176, defendants pointed out in the trial court that because, as a matter of law, a person has no exclusive right to use a highly descriptive, generic term in a trade name, plaintiff had no exclusive right to the use of the term "government." Defendants asserted that, as a result, plaintiff could not support his deceptive trade practice or unfair competition claim.

{¶33} In response, plaintiff argued that if he could prove Governmental Systems acquired a secondary meaning within the pool of customers shared with defendants, he would prevail. Relying upon *EDP Consultants, Inc. v. Triggs Technologies, Inc.*, 11th Dist.

No. 2001-L-067, 2003-Ohio-474, plaintiff contended the standard is not how the general public, but rather the smaller group of potential clients, perceives a name.

{¶34} Plaintiff's arguments fail for several reasons. Initially, the trial court rejected the evidence he submitted to support his contentions, concluding it was inadmissible hearsay. Moreover, the trial court correctly dismissed plaintiff's argument, pointing out that, other than the common use of the generic term "government," the parties' respective trade names lack any similarity and thus did not generate any confusion regarding their separate identities. Finally, plaintiff's reliance on *EDP Consultants* is misplaced; that case does not address the secondary meaning afforded to a generic term such as "government," but instead concludes that under certain circumstances a personal name can acquire a secondary meaning within a particular client base. The facts here do not implicate the holding of *EDP Consultants*, and the trial court did not err in refusing to apply it.

{¶35} In his memorandum in the trial court opposing defendants' summary judgment motion, plaintiff did not directly challenge defendants' argument that plaintiff did not demonstrate a genuine issue of material fact for resolution at trial. In his appeal, he similarly does not attack directly the trial court's determination that no genuine issue of material fact exists. Instead, plaintiff's second and third arguments under his second assignment of error contend (1) defendants' summary judgment motion was filed out of rule, and thus the trial court erred in considering it; and (2) because discovery had not been concluded, the trial court should not have determined the summary judgment motion.

{¶36} Plaintiff argues that under Civ.R. 56(B), defendants were required to seek leave of the court before filing their summary judgment motion, as the case already had been set for trial. Civ.R. 56(B) states "[a] party against whom a claim * * * is asserted * * * may, at any time, move * * * for a summary judgment in the party's favor," but "[i]f the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court." When defendants filed their summary judgment motion on July 31, 2006, the trial court had set a trial date of September 18, 2006; the same order establishing the trial date however required dispositive motions to be filed by July 31, 2006. By setting that deadline, the trial court implicitly granted leave for each party to file a dispositive motion by that date. While anything filed after that deadline would require leave of the court, defendants' filing within the parameters the trial court established complied with the civil rules; no leave of court was necessary.

{¶37} To support his contention that summary judgment should not have been granted until discovery was completed, plaintiff points to *Cohen v. Univ. of Dayton*, 164 Ohio App.3d 29, 2005-Ohio-5780 and *Kalb v. Morehead* (1995), 100 Ohio App.3d 696. Neither case advances plaintiff's argument. In *Cohen*, the trial court abused its discretion when it denied the appellant a continuance, pursuant to Civ.R. 56(F), to allow the continued discovery necessary to respond to the opposing party's motion for summary judgment. Unlike the *Cohen* appellant, plaintiff here did not seek a Civ.R. 56(F) continuance.

{¶38} *Kalb* is factually closer to the facts plaintiff faces, as a discovery dispute in *Kalb* shelved all attempts at conducting discovery in that case. The trial court's action

here, however, distinguishes *Kalb*. In *Kalb*, after the appellant filed overbroad discovery requests, the trial court responded by granting the overbroad protective orders the appellees sought. In contrast, here the trial court sought resolution of the dispute by assigning the matter to a magistrate. The magistrate determined that plaintiff's requests were too broad and asked plaintiff to resubmit narrower requests. Plaintiff's own failure to comply with the magistrate led the trial court to deny plaintiff's motion to compel.

{¶39} Because (1) plaintiff failed to demonstrate the existence of a genuine issue of material fact, (2) defendants' summary judgment motion was not improperly filed, and (3) the trial court did not improperly thwart plaintiff's discovery efforts, his second assignment of error is overruled.

{¶40} Having overruled both of plaintiff's assignments of error, we affirm the trial court's judgment. Defendants' motion to strike plaintiff's brief and reply brief is rendered moot.

*Judgment affirmed;
motion moot.*

KLATT and CONNOR, JJ., concur.
