

1982

# System Concepts, Inc. v. Shirley M. Dixon : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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SYSTEM CONCEPTS, INC., )  
a Utah corporation, )  
 )  
Plaintiff and Appellant, )  
 )  
vs. ) Civil No. 18034  
 )  
SHIPLEY M. DIXON, )  
an individual, )  
 )  
Defendant and Respondent, )  
\_\_\_\_\_)

RESPONDENT'S BRIEF

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL  
DISTRICT COURT FOR SALT LAKE COUNTY, STATE  
OF UTAH, THE HONORABLE DAVID B. DEE PRESIDING

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RESPONDENT'S BRIEF  
\_\_\_\_\_

STATEMENT OF THE KIND OF CASE

This is an action for alleged breach of a covenant not to compete. Plaintiff seeks preliminary and permanent injunctive relief and damages against defendant, its former employee.

DISPOSITION IN LOWER COURT

After an evidentiary hearing, the lower court denied plaintiff's motion for a preliminary injunction.

RELIEF SOUGHT ON APPEAL

The lower court's denial of the motion for preliminary injunction should be affirmed.

## STATEMENT OF FACTS

In May of 1978, respondent Shirley M. Dixon (hereinafter "Dixon") accepted employment with appellant System Concepts, Inc. (hereinafter "SCI"), a company engaged in the manufacture and sale of "character generators", which are used in the television industry. Her job title was sales coordinator; her duties included answering phones, compiling customer lists, assisting in advertising and coordinating sales leads. (Tr. p.38).

In November of 1978, Dixon was asked to sign a "Proprietary Information Agreement" (Plaintiff's Exhibit 9). She was reluctant to sign the agreement and did not do so until January of 1979, under threat of loss of her employment. (Tr. p.38). Dixon had no part in the drafting or negotiation of the agreement. (Tr. p.39). At the time Dixon signed the agreement, she did not receive a promotion or raise. Her employment was at all times terminable at will by either party. (Tr. p.40).

During the time that Dixon was employed by SCI, her duties were entirely in the area of sales. She had no technical functions and was not involved in research or development of products. (Tr. p.39).

In March of 1981, Dixon terminated her employment with SCI and shortly thereafter accepted employment with MetroData Corporation. At the time she left SCI, Dixon did not take with her any information, data, customer lists or files.

In July of 1981, SCI filed this action against Dixon and MetroData Corporation, alleging unfair competition, breach of the

agreement, breach of fiduciary duty, interference with contractual relations and misappropriation of prospective advantage and seeking preliminary and permanent injunctions and actual and punitive damages.

In its motion for preliminary injunction, SCI sought to restrain MetroData Corporation from employing Dixon and to restrain Dixon from being employed by MetroData Corporation.

The action was dismissed as to MetroData Corporation on the grounds that the court had no jurisdiction over it. Dixon answered and counterclaimed for commissions due her. After an evidentiary hearing, the court denied the motion for preliminary injunction against Dixon.

SCI then petitioned for this interlocutory appeal, seeking reversal of the lower court's order denying the injunction.

#### ARGUMENT

- I. THE LOWER COURT'S DENIAL OF THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE AFFIRMED BECAUSE SCI FAILED TO PRESENT SUFFICIENT EVIDENCE TO ENTITLE IT TO PRELIMINARY INJUNCTIVE RELIEF.

A preliminary injunction is considered an extraordinary remedy and a motion for such an injunction should not be granted unless the movant, by a clear showing, carries the burden of persuasion. (Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, §2948). The grant or denial of a preliminary injunction is



subject to the trial court's discretion and the trial court's findings are not to be disturbed on appeal unless they are clearly erroneous or constitute an abuse of discretion. Penn v. San Juan Hospital, 528 F.2d 1181 (10th Cir. 1975), Franklin v. Bartas Realty, Inc., 598 P.2d 1147 (Nev. 1977).

The single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if the injunction is not granted, the moving party will suffer irreparable injury before a decision on the merits can be rendered. (Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, §2948, see also, Utah Rules of Civil Procedure, Rule 65A(e)(2).

At the evidentiary hearing on the motion for preliminary injunction in this case, SCI presented no evidence that it would be irreparably harmed if the injunction were not granted. In fact, SCI's president, Ray Unrath, testified that he did not know of any sales which had been lost to Dixon's employer, MetroData Corporation (Tr. p.18) and that at least as to one product which he claimed MetroData Corporation was selling in competition with SCI, that product had not been introduced to the market until after Dixon had left her employment with SCI. (Tr. p.18-19).

Neither of the two witnesses called by SCI offered any specific testimony to indicate that SCI would be damaged if Dixon continued to be employed by MetroData. Thus, SCI is not entitled to a preliminary injunction since it has not shown that it would be irreparably injured if the injunction is not granted.



II. THE TRIAL COURT'S FINDINGS OF FACT AND CON-  
CLUSIONS OF LAW ARE SUPPORTED BY SUFFICIENT  
EVIDENCE.

The lower court made no finding that SCI would suffer any damage as a result of Dixon's continued employment at MetroData or that MetroData and SCI were competing with respect to the sales of any product. SCI did not suggest that any additional findings should be made and approved as to form the findings and conclusions that were entered. (Record at 55).

In addition, although SCI now draws attention in its brief to the fact that the evidentiary hearing was relatively short, it did not object to that fact at the time of the hearing.

The findings entered by the trial court and the evidence adduced at the hearing support the court's conclusions of law. It is obvious that forcing Dixon to give up her employment would create great hardship for her. As the conclusions indicate, the trial court recognized that an injunction is an equitable remedy and that, upon a balancing of the equities, greater hardship appeared to be shown on the part of Dixon. In addition, the trial court concluded, based on the circumstances under which the agreement was signed, that it was a contract of adhesion, and there is sufficient evidence to support that conclusion.

The trial court further concluded that SCI had failed to show that it was entitled to a preliminary injunction under the provisions of Rule 65A of the Utah Rules of Civil Procedure. Those standards include the necessity of showing irreparable

injury unless an injunction is entered, and SCI failed to meet its evidentiary burden on that issue.

III. THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED  
BECAUSE SCI HAS NOT MADE A SUFFICIENT SHOWING  
THAT THE AGREEMENT IN THIS ACTION SHOULD BE  
ENFORCED BY PRELIMINARY INJUNCTIVE RELIEF.

Despite the fact that the agreement sought to be enforced by SCI is entitled "Proprietary Information Agreement", the motion for preliminary injunction did not relate to any alleged misuse of such information by Dixon. Instead, the only provision of the agreement sought to be enforced was paragraph 6, which prohibited the signing employee from being employed by a "conflicting organization" for a period of two (2) years after termination of employment with SCI.

Paragraph 7 of the agreement defines a "conflicting organization" as one which is engaged in research, development, production, marketing or selling of a conflicting product. A "conflicting product" is defined as one which resembles or competes with a product, process or service upon or with which the employee works during his or her employment with SCI.

The authorities cited by SCI do not support the proposition that this provision is enforceable by means of a preliminary injunction. Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823 (1951) was an action for a declaratory judgment to determine

the validity of a covenant not to compete. The court held that the covenant was valid because:

(a) It was supported by consideration;

(b) No bad faith had been shown in the negotiation of the contract;

(c) The covenant was necessary to protect the goodwill of the business; and

(d) The covenant was reasonable in its restrictions as to time and area.

Besides the fact that the Allen case did not involve injunctive relief, it is distinguishable on other grounds. The agreement in Allen that included the covenant was entered into at the time the employee was hired, not after he had already been employed for some time as Dixon was in this case. In addition, the agreement which included the covenant was a negotiated one, not a form agreement whose terms were imposed by the employer. The area covered by the covenant, two (2) miles, was limited and was specifically found by the court to be reasonable.

In this case, the court made no finding as to the necessity of the covenant to protect SCI's goodwill. The covenant has no limitation as to geographical area and the court made no findings as to the reasonableness of the geographical area or duration of the covenant.

In Shaw v. Jeppson, 121 Utah 155, 239 P.2d 745 (1952), the only other case cited by SCI, the primary issue on appeal was whether plaintiff was the real party in interest and entitled to

enforce a restrictive covenant, not whether the covenant itself was enforceable. In affirming the judgment of the trial court, the Utah Supreme Court noted that:

The phase of this case under review, that is, pertaining to the injunction, is equitable. Therefore, although the court will review the evidence, it will not disturb the findings of the trial court unless they are clearly against the weight of the evidence. 239 P.2d at 747 (Citations omitted).

The Allen case was cited only in the concurring opinion of Justice Wolfe and there was no discussion of the reasonableness of the covenant sought to be enforced.

SCI also cites Sections 395 and 396 of the Restatement of Agency in support of its argument. Section 395 is entitled "Using or Disclosing Confidential Information" and Section 396 is entitled "Using Confidential Information After Termination of Agency". There was no evidence at the hearing on the preliminary injunction in this case that Dixon was using or threatening to use the confidential information acquired by her in connection with her employment by SCI. For that reason, these sections are simply not applicable in this case.

The Allen case stands for the proposition that a restrictive covenant which meets the requirements set forth in that case may be enforced. In this case, SCI has failed to show that the provisions of the agreement it seeks to enforce meet those requirements. Nor has SCI met the additional burden of showing that it is entitled to preliminary injunctive relief.

#### CONCLUSION

Shirley M. Dixon has now been employed by MetroData Cor-

poration for almost a year. Even if SCI had shown that it would suffer injury to its goodwill as a result of that employment, a good part of that injury would already have occurred. Enjoining Dixon from continuing her employment until the trial of this case would work a great hardship on her without a corresponding benefit to SCI.

Even if that were not the situation, however, SCI has not shown that it is entitled to enforce the restrictive covenant provisions of the agreement by means of a preliminary injunction.

The trial court's order should be affirmed.

Respectfully submitted this 23rd day of March, 1982.

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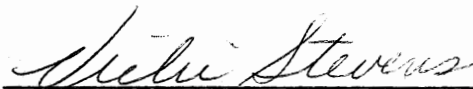
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered two (2) copies of the foregoing Respondent's Brief to the following persons, this 23rd day of March, 1982:

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