1982

System Concepts, Inc. v. Shirley M. Dixon : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

SYSTEM CONCEPTS, INC., a Utah corporation, Appellant, vs. SHIRLEY M. DIXON, an individual, Respondent.	Civil No. 18034

APPELLANT'S REPLY 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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Pursuant to the provisions of Rule 75, Utah Rules of Civil Procedure and in accordance therewith, Appellant hereby responds to Respondent's Brief on file herein.

STATEMENT OF FACTS

Appellant takes issue with Respondent's strong implication that there was no consideration for Respondent's execution of the proprietary information and restrictive employment agreement ("Agreement") involved here. Respondent did receive a promotion and raise shortly after she executed the Agreement (Transcript at 42-43, Exh. 12) and received the Agreement's stated consideration of continued employment with Appellant until she voluntarily terminated such employment. Significantly, the trial court specifically found adequate compensation and consideration for Respondent's execution

of the Agreement (Transcript at 43-44).

Appellant also contends, contrary to Respondent, that Respondent, during her employment, was involved in the design and development of Appellant's products. Respondent testified that she made design and operation suggestions in response to a specific request by Appellant. Respondent's suggestions were solicited because of her knowledge of customer needs and desires (Transcript at 39-40, 15-18 Exh. 10).

ARGUMENT

I. APPELLANT HAS MET ITS BURDEN FOR THE PRELIMINARY INJUNCTION SOUGHT.

At pages three and four of her Brief, Respondent cites Wright & Miller, Federal Practice and Procedure §2948 to support her contention that Appellant is not entitled to a preliminary injunction because Appellant has not clearly carried the burden of persuasion and has not met the primary requirement for a preliminary injunction, that being evidence of irreparable injury.

Respondent's quote from Vol. 11 Wright and Miller, Federal Practice and Procedure §2948 is followed by an admonition that

> [a]lthough these short hand formulations ['movant, by a clear showing carries the burden of persuasion'] express the courts' general reluctance to impose an interim restraint on Defendant before the parties' rights have been adjudicated, they do not take the place of a sound evaluation of the factors to granting relief under Rule 65(a). Id. at 429-30.

Wright and Miller also suggest that the most important prerequisite for granting a preliminary injunction "is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." Id. at 431 (emphasis added). Thus, merely "[a] presently existing actual

threat must be shown," not actual or certain injury. Id. at 437.

Appellant clearly has carried its burden in showing likely and actual threatened harm to Appellant. There is substantial evidence in Respondent's testimony and Brief that Respondent was an integral part of Appellant's marketing and sales program, was privy to confidential, proprietary information (Transcript at 15-18, 22-23, 25-28, 38, 40, 44) and had among her duties to Appellant compiling customer lists, assisting in promotion, and coordinating sales leads (Respondent's Brief at 2). As aforestated, Respondent had input into Appellant's designs for its products. There is overwhelming evidence of the goodwill Appellant built around Respondent during her employment (Transcript at 25-28, 46, Exh. 13).

There is no question that Respondent is now employed by MetroData as its national sales manager which employment will continue during the pending of this action. Respondent now has the incentive and ability to and has in fact misappropriated the good will and information she obtained during her employment with Appellant for use by a direct competitor of Appellant (Transcript at 29, 44-45). Respondent knows Appellant's actual and potential customers, their needs and desires and how Appellant's products respond to those needs and desires. Respondent knows Appellant's marketing strategy and in fact was an integral part of that marketing strategy because of the goodwill Appellant built for her in the cable television industry.

Respondent's likely, threatened and actual misappropriation of Appellant's confidential, proprietary information and goodwill has and will cause irreparable injury to Appellant; such likely,

threatened and actual injury will impair the court's ability to grant an effective remedy absent injunction. Wright and Miller, supra at 434. "Injury to . . . goodwill is not measurable in monetary terms, and so often is viewed as irreparable." Id. at 439. Respondent must, therefore, be enjoined. The fact that injury may have already occurred only supports restraining its continuance.

II. THE TRIAL COURT'S FINDINGS OF FACT AND THE RECORD EVIDENCE DO NOT SUPPORT THE TRIAL COURT'S CONCLUSIONS OF LAW OR ORDER.

Respondent contends that the lower court's findings of fact and conclusions of law are supported by the evidence. Appellant contends that the lower court's conclusions of law have no support in its findings or the evidence. The fact that Appellant has approved the lower court's conclusions of law as to form cannot be construed as approval as to substance; neither does Appellant's honoring the time constraints of the trial court consitute waiver.

Appellant contends there is no evidentiary basis to support the trial court conclusions that i) "[i]ssuance of a preliminary injunction . . . would prohibit Defendant Dixon from any employment within the industry in which she is trained", that ii) "great hardship for Defendant Dixon would be created", that iii) "[t]he contract is a contract of adhesion," that iv) "enforcement of it [contract] would create substantial hardship for Defendant Dixon," that v) "plaintiff is not entitled to the equitable remedy of a preliminary injunction," and that vi) "[p]laintiff has failed to meet the standards of Rule 65A . . . governing issuance of a preliminary injunction." Such far-reaching conclusions are not supported by the findings from the record evidence of Appellant's corporate

status, location and business; Respondent's employment by Appellant; the language of Respondent's Agreement with Appellant; MetroData's business; and Respondent's employment by MetroData.

Respondent's argument at page five of her Brief that the lower court's findings of fact and conclusions of law are supported by the evidence is replete with conclusory phrases such as "It is obvious", "As the conclusions indicate", "there is sufficient evidence", but Respondent does not cite the findings or record evidence which supposedly support the lower court's conclusions of law. Respondent's argument merely shows that the lower court made conclusions of law supporting Respondent's position; it does not show the evidentiary basis for such conclusions of law because there is no such evidentiary basis.

III. THE EMPLOYMENT CONTRACT IN THIS ACTION IS PROPERLY ENFORCEABLE BY INJUNCTIVE RELIEF.

Respondent contends that the law cited by Appellant does not support the grant of a preliminary injunction to enforce Respondent's Agreement. Respondent contends that Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823 (1951) is distinguishable and Shaw v. Jeppson, 121 Utah 155, 239 P.2d 745 (1952) does not appropriately deal with the issue involved here.

The Allen case did result in a declaratory judgment that a covenant not to compete meeting its criteria is enforceable according to its terms. In Allen, enforcement of the covenant required Plaintiff to honor the restrictions on his future employment to which he had previously agreed. This is exactly the relief sought by Appellant against Respondent here, i.e. that she

honor her Agreement which provides for injunctive relief and restricts her future employment.

Also, Plaintiff Allen, like Respondent in this case, did make his agreement not to compete sometime after he was hired, 237 P.2d at 824; Plaintiff Allen, like Respondent here, did not negotiate the covenant not to compete, although he did negotiate other terms of his employment. Id. Furthermore, record evidence shows that the area and duration of the covenant is necessary in order to protect Appellant's nationwide marketing area and is thus reasonable.

Admittedly the Shaw appellate opinion did not center on the issue of enforceability of a restictive covenant by injunction because such issue had already been determined in favor of enforceability and was not raised on appeal. Justice Wolfe, however, in his concurrence did cite Allen to support his view that restrictive covenants are enforceable in accordance with their terms, including enforcement by the injunctive remedy granted in Shaw. 239 P.2d at 748-49.

Furthermore, Appellant stands by its citation of Restatement 2d Agency §§ 395, 396 (1958) because the likely, threatened and actual use by Respondent Dixon of confidential and properietary information admittedly acquired by her during her employment with Appellant is an important aspect of this case. Such is a major factor of the irreparable injury caused and to be caused Appellant which gives the Appellant the right to the relief it seeks.

CONCLUSION

Respondent's Agreement meets the criteria of Allen and is thus enforceable according to its terms, including enforcement by injunction as was done in Shaw.

The trial court's conclusions of law, pursuant to which it denied Appellant's motion for a preliminary injunction, have no support in the trial court's findings of fact gleaned from the record evidence presented; therefore the trial court abused its discretion in using such erroneous conclusions to support its Order.

Appellant has shown, to the extent possible, the irreparable injury caused Appellant by Respondent's going to work for MetroData and the irreparable injury to be caused Appellant if Respondent is allowed to continue misappropriating Appellant's goodwill and proprietary information through continued employment with MetroData. Hardship to Respondent can be mollified by security; hardship to Appellant cannot. Therefore, the lower court should be reversed and directed to enter a preliminary injunction as requested by Appellant.

Respectfully submitted this 2nd day of August, 1982.

PARSONS & CROWTHER

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CERTIFICATE OF SERVICE

Two copies of the foregoing Brief were mailed, postage prepaid, to Ellen Maycock, Kruse, Landa, Zimmerman & Maycock, Attorneys for Respondent, 620 Kearns Building, 136 South Main, Salt Lake City, Utah this 2nd day of August, 1982.

Cynthia J Carr