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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-460

No. COA21-730

Filed 5 July 2022

Iredell County, No. 19CVS627

ELITE VEHICLES, INC., and BRIAN E. RICHARDS, individual and as the President of ELITE VEHICLES, INC., Plaintiffs,

v.

FRANCIS A. LEE, Defendant.

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FRANCIS A. LEE (individually and derivatively on behalf of ELITE VEHICLES, INC.), Counterclaim Plaintiff,

v.

BRIAN E. RICHARDS, Counterclaim Defendant,

and

ELITE VEHICLES, INC., Nominal Counterclaim Defendant.

Appeal by plaintiffs from order entered 26 March 2021 by Judge William A. Long Jr. in Iredell County Superior Court. Heard in the Court of Appeals 25 May 2022.

*Devore, Acton & Stafford, P.A., by Joseph R. Pellington, for plaintiffs-appellants.*

*Veach Law, PLLC, by John B. Veach, III, for plaintiffs-appellants.*

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*Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak and Erik M. Rosenwood, for defendant-appellee.*

GORE, Judge.

¶ 1 Plaintiffs Elite Vehicles, Inc. (“Elite”) and Brian E. Richards brought claims against defendant Francis E. Lee for trade secret misappropriation under the North Carolina Trade Secrets Protection Act (the “NCTSPA”), unfair and deceptive trade practices pursuant to Chapter 75 of the North Carolina General Statutes, and breach of fiduciary duty. Defendant filed a Motion for Summary Judgment and plaintiffs filed a Motion to Dismiss and/or Motion for Summary Judgment. The trial court entered its order (the “Order”) on 26 March 2021 granting summary judgment in favor of defendant. Plaintiffs timely filed and served Notice of Appeal.

¶ 2 The trial court’s Order constitutes a final disposition of the claims in this matter. This Court has jurisdiction to hear plaintiffs’ appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(1).

¶ 3 On appeal, plaintiffs waive their claim for breach of fiduciary duty. The only issues before this Court are whether the trial court erred by granting summary judgment in favor of defendant with respect to the NCTSPA and Chapter 75 claims. Upon review, we affirm the trial court’s Order.

**I. Background**

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¶ 4 On 12 January 2015, the parties incorporated Elite for the initial purpose of building a high-performance automobile. At formation, Mr. Richards and Mr. Lee were joint shareholders of Elite, with Mr. Richards initially owning ninety percent and Mr. Lee owning the remaining ten percent. Mr. Richards’s role with Elite was to design, develop, and build the vehicle. Mr. Lee was responsible for funding the startup capital of Elite, and he made an initial contribution of \$170,000.00 for that purpose. Mr. Richards served as Elite’s CEO and president. Mr. Lee was a director.

¶ 5 Shortly after formation, the primary purpose of Elite transitioned to the development of a luxury pontoon boat designed by Mr. Richards. Mr. Richards began designing the boat approximately five to six years before the parties formed Elite. The design included a unique fold-down platform that allowed passengers to have an unobstructed 180-degree swim platform extending from the rear of the boat. According to Mr. Richards, the “primary design innovation” was “[t]he folding swim platform extension.” The trade secret, Mr. Richards testified, was primarily the connection between the fold-down sides and the rear swim platform as an extension of the whole entertainment area of the boat.

¶ 6 Between 2009 and 2015, Mr. Richards did not tell anyone about his design. He did not take steps to file a patent and did not recall whether he attempted to trademark, copyright, or otherwise protect his idea. To the best of his recollection, the first time he attempted to protect his idea was in 2016, after the formation of

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Elite. Mr. Richards sought to protect his design by having individuals sign a “Confidentiality and Non-Circumvention Agreement” (“NDA”).

¶ 7

On or about 29 February 2016, Mr. Richards asked defendant to contribute additional funding towards Elite’s development of the boat. On 4 March 2016, the parties amended their ownership agreement, according to which defendant purchased an additional five percent interest in Elite for \$50,000.00. Defendant tendered payment over a period of months. Mr. Richards testified these installments were insufficient to both cover Elite’s monthly operating expenses and to also obtain patents.

¶ 8

Once all of Elite’s capital had been depleted, including defendant’s additional contribution of \$50,000.00, Elite was out of money. Mr. Richards testified the boat was never produced due to Elite’s financial status. Elite had neither procured additional funding nor customers.

¶ 9

The dispute at issue in the matter arose around 9 February 2016, when defendant requested Mr. Richards send him 3D renderings of the boat design. On 10 February 2016, defendant wrote to Mr. Richards asking for his permission to show the boat design to a third-party, Raymond George of Morgan Stanley, once Mr. George had signed an NDA. Defendant was consulting with Mr. George, his financial advisor, as to whether he should make the additional \$50,000.00 investment discussed above. Mr. Richards agreed under the condition that he be apprised of the

situation, and that no one could see the boat design without an executed NDA.

¶ 10 Defendant testified Mr. George’s company would not allow him to sign an NDA. Despite Mr. Richards’s instructions, defendant received 3D renderings of the boat design and discussed the prototype with Mr. George. Mr. George advised defendant not to invest additional funds.

¶ 11 Mr. Richards claims defendant told him that Mr. George had contacted Brunswick Corporation to discuss the design with the company. Mr. Richards contends that in January 2017, “Sea Ray Boats, a Brunswick company, introduced a new boat model which featured Mr. Richards’s primary design innovation.” The claims in this matter center on the contention that Sea Ray developed its Sea Ray SLX 400 after having misappropriated the boat design. Unlike Elite’s boat, the Sea Ray SLX 400 only has one side that folds down, and it is not a pontoon boat.

¶ 12 Mr. George denied discussing Elite’s boat with anyone at Brunswick or receiving the details about the boat. Mr. George stated he only discussed, in an “extremely general sense,” Elite’s business model and focus on the boat, so he could financially advise defendant as to whether he should invest additional funds into the company. He never spoke with anyone at Brunswick regarding the boat design or its feasibility. Brunswick also denied any of its employees and/or agents ever spoke with Mr. George. Brunswick asserted the Sea Ray SLX 400 was designed prior to the purported date of misappropriation, and specifically testified it did not use Elite’s

boat design.

¶ 13 It is plaintiffs' contention in this case that defendant's act of disseminating the boat design, without authorization, constituted misappropriation of a trade secret and unfair and deceptive trade practices.

## II. Standard of Review

¶ 14 "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quotation marks and citation omitted). "Under de novo review, we consider the matter anew and freely substitute our own judgment for that of the lower tribunal." *Barrow v. D.A.N. Joint Venture Props. of N.C., LLC*, 232 N.C. App. 528, 530, 755 S.E.2d 641, 644 (2014) (*purgandum*).

¶ 15 As the moving party, defendant assumes the burden of clearly demonstrating "there is no genuine issue of material fact and that [he] is entitled to judgment as a matter of law." *Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 137-38, 605 S.E.2d 254, 257 (2004) (citation omitted). If defendant fails to meet his initial burden, then plaintiffs are not required to present evidence in support of their claim. *Bernick v. Jurden*, 306 N.C. 435, 441, 293 S.E.2d 405, 409 (1982). However, once defendant satisfies his burden of proof, plaintiffs "must in turn either show that a genuine issue

of material fact exists for trial or must provide an excuse for not so doing.” *Id.* “All inferences are to be drawn against the moving party and in favor of the opposing party. Likewise, on appellate review of an order for summary judgment, the evidence is considered in the light most favorable to the nonmoving party.” *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999) (quotation marks and citations omitted).

¶ 16 “A party may not withstand a motion for summary judgment by simply relying on its pleadings; the non-moving party must set forth specific facts by affidavits or as otherwise provided by N.C. Gen. Stat. § 1A-1, Rule 56(e), showing that there is a genuine issue of material fact for trial.” *Strickland v. Doe*, 156 N.C. App. 292, 294-95, 577 S.E.2d 124, 128 (2003) (citation omitted). “The other methods for setting forth specific facts under Rule 56 are through depositions, answers to interrogatories, admissions on file, documentary materials, further affidavits, or oral testimony in some circumstances. *Id.* at 295, 577 S.E.2d at 128 (citations omitted).

### III. Misappropriation of a Trade Secret

¶ 17 Plaintiffs argue the trial court erred by granting summary judgment in favor of defendant on their NCTSPA claim. Specifically, plaintiffs contend they presented substantial evidence to establish a *prima facie* case that defendant’s action of disseminating the boat design, without authorization, constituted misappropriation of a trade secret. We disagree.

¶ 18 Under the NCTSPA, “[t]he owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret.” N.C. Gen. Stat. § 66-153 (2021). Thus, we first assess whether plaintiffs forecast substantial evidence that the fold-down swim platform design qualifies as a trade secret under the NCTSPA. The term “trade secret” means

business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

- a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by 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.

§ 66-152(3). In order to withstand a motion for summary judgment, plaintiffs must first set forth facts with sufficient specificity to allow a reasonable finder of fact to conclude Mr. Richards’s design satisfies these two requirements.

¶ 19 Plaintiffs have not forecast evidence showing a reasonable fact finder could conclude his unique design “[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use.” § 66-152(3)(a). To the contrary, Mr. Richards acknowledges

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various swim platform designs are prevalent in the industry, and the possibility that a competitor could independently develop a design that is substantially similar to the one that he created.

¶ 20           Included in the record are patents showing various iterations of fold-down swim platforms, which have existed on a variety of boat designs for years prior to the alleged misappropriation in this case. These documents shed light on the prevalence of comparable designs, which have already been developed, implemented, and retailed by competitors in the industry. In his affidavit, Mr. Richards acknowledges, “the patents, and there are more of them going back 50 plus years, show that many people and businesses have had ideas about a fold down part of a boat and MANY of them received patents.” Notably, Mr. Richards was asked at his deposition whether it was “possible that someone from Brunswick had reached this design concept through independent thinking, outside of your design?” Mr. Richards answered in the affirmative, admitting it was possible.

¶ 21           Thus, we determine plaintiffs have not met their burden in showing a genuine issue of material fact exists as to whether Mr. Richards’s design was trade secret as defined by the NCTSPA.

¶ 22           As to plaintiffs’ claim for misappropriation, the term “misappropriation” is defined as the “acquisition, disclosure, or use of a *trade secret* of another without express or implied authority or consent, unless such *trade secret* was arrived at by

independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.” § 66-152(1) (emphasis added). The existence of a protectable trade secret is an essential element in plaintiffs’ ultimate claim for relief. Thus, plaintiffs fail to meet their burden for misappropriation where they fail to set forth specific facts establishing the existence of a trade secret. Summary judgment was merited on this ground alone.

#### IV. Unfair and Deceptive Trade Practices

¶ 23 To establish a violation of § 75-1.1 and prevail on a claim for unfair and deceptive trade practices, a party must show: (1) an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that proximately caused injury to the party. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998); § 75-1.1(a). Here, plaintiffs’ Chapter 75 claim for unfair and deceptive trade practices is based on the same facts alleged in their § 66-152 claim for misappropriation of a trade secret.

¶ 24 Having previously determined the trial court properly granted summary judgment in favor of defendant on plaintiffs’ claim for misappropriation, it necessarily follows that their Chapter 75 claim cannot withstand summary judgment as well. *See Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 374, 555 S.E.2d 634, 642 (2001) (“Here, plaintiff’s claim that defendants engaged in unfair and deceptive trade practices rests with its claims for misappropriation of trade secrets . . . . Having

determined that the trial court properly granted summary judgment on [the misappropriation claim], we likewise conclude that no claim for unfair and deceptive trade practices exists.”); *see also Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 526, 586 S.E.2d 507, 512 (2003) (holding that the plaintiff’s claim for unfair and deceptive trade practices under § 75-1.1 based solely on the defendants’ alleged misuse of its trade secret must fail where summary judgment was properly granted on the misappropriation claim). Thus, summary judgment was properly granted on plaintiffs’ claim for unfair and deceptive trade practices.

## **V. Conclusion**

¶ 25

For the foregoing reasons, the trial court properly granted summary judgment in favor of defendant on plaintiff’s claims for misappropriation of a trade secret and unfair and deceptive trade practices. Given our resolution of this matter, above, it is unnecessary to address the parties’ alternative arguments.

**AFFIRMED.**

Judges DIETZ and WOOD concur.

Report per Rule 30(e).