

FOURTH DIVISION
October 10, 2013

No. 1-12-3442

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e) (1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---------------------------|---|------------------|
| STEINER ELECTRIC COMPANY, |) | Appeal from the |
| |) | Circuit Court of |
| |) | Cook County. |
| Plaintiff/ |) | |
| Counter-defendant- |) | |
| Appellee, |) | |
| |) | |
| v. |) | No. 06 L 13090 |
| |) | |
| CORKILL ELECTRIC COMPANY, |) | |
| |) | |
| Defendant/ |) | |
| Counter-plaintiff- |) | |
| Appellant, |) | |
| |) | |
| (GARY P. CORKILL, |) | Honorable |
| |) | John C. Griffin, |
| Defendant). |) | Judge Presiding. |

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *HELD:* The trial court's ruling granting summary judgment in favor of Steiner Electric Company is affirmed.

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¶ 2 Steiner Electric Company (Steiner) filed a complaint against Corkill Electric Company (Corkill) and Gary Corkill (Gary) claiming that Corkill had failed to pay invoices for over two years. In response to Steiner's complaint, Corkill filed affirmative defenses and counterclaims alleging that Steiner had engaged in a conspiracy with one of Corkill's former employees, Peter Zervos, to create a competing business, Elcon Electrical Construction Company (Elcon), while Zervos was still employed by Corkill and to use Corkill's money to purchase goods and services for Elcon and Zervos personally.

¶ 3 On April 3, 2012, Steiner filed a motion for summary judgment seeking judgment in its favor on its claims against Corkill as well as Corkill's counterclaims against Steiner. On July 11, 2012, the trial court granted Steiner's motion for summary judgment in its entirety and ordered Corkill to pay Steiner damages in the amount of \$445,537.78, plus finance charges, attorney fees, costs and expenses. Corkill filed a motion to reconsider the court's July 11, 2012 order, which was denied on October 17, 2012. Corkill timely filed a notice of appeal seeking to reverse the trial court's July 11, 2012 order granting summary judgment in favor of Steiner and the trial court's October 17, 2012 order denying reconsideration of the July 11, 2012 order claiming that there is a genuine issue of

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material fact as to Steiner's participation in a conspiracy. For the reasons that follow, we affirm the trial court's order granting summary judgment in favor of Steiner.

¶ 4 BACKGROUND

¶ 5 From 1957 through September 2006, Corkill Electric Company (Corkill) purchased electric equipment from Steiner Electric Company (Steiner). As was Steiner's custom and practice, Steiner would periodically have its customers fill out and update credit applications. Consistent with this practice, on January 24, 2004, defendant Gary Corkill (Gary), as president of Corkill, signed and delivered a credit application to Steiner. The credit application identified "Pete Zervos, Gary Corkill, and Bo Pilkington" as a "Partial List of Authorized Buyers". Between February 2004 and September 2006, Steiner sold electric products to Corkill.

¶ 6 As of June 23, 2005, Steiner had not received any payments for orders placed by Corkill since the beginning of 2004. In order to continue buying from Steiner, on June 23, 2005, Gary signed and delivered a personal guarantee for the expenses owed and Steiner continued to sell goods to Corkill. Nevertheless, Corkill continued not to pay for any of the electric products that Steiner delivered through September 2006.

¶ 7 On December 14, 2006, Steiner filed a complaint for damages

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against Corkill and Gary to recover \$113,485.02 in electric products which were delivered to Corkill without payment. The complaint also requested applicable finance charges, attorney fees and other expenses incurred in collecting Corkill's debt.

¶ 8 Corkill concedes that the amounts claimed in Steiner's complaint have not been paid to Steiner¹; however, argues that such payments are not owed to Steiner because Steiner assisted one of Corkill's employees, Peter Zervos, in breaching fiduciary duties owed to Corkill. Specifically, Corkill alleges that (1) Steiner assisted Zervos in creating a competing business, Elcon Electrical Construction Company (Elcon), while he was still employed by Corkill and (2) assisted Zervos in buying goods from Steiner in Corkill's name for the benefit of Zervos personally and Zervos' new business, Elcon.

¶ 9 Zervos had been employed by Corkill since 1999. He was president of Corkill from 2005 to January 1, 2006. On January 1, 2006, Zervos was removed as president, but continued to be employed by Corkill as an estimator. On February 27, 2006, Zervos incorporated his own business, Elcon, while still employed by Corkill.

¶ 10 In March 2006, Zervos asked Steiner's employee Joseph Dible

¹In its answer to Steiner's complaint, Corkill "admits that it has not paid the amounts claimed by Steiner."

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if they could meet at Steiner's office. At the Steiner office, Dible and Zervos met behind closed doors. During the meeting, Zervos informed Dible that he intended to leave Corkill to start a new company, Elcon. Zervos told Dible that he had not yet informed Corkill of his decision to leave and asked Dible not to tell Corkill about this decision. Dible agreed not to say anything to Corkill.

¶ 11 Dible testified at his deposition that at the time of the March 2006 meeting, Dible understood Zervos to be a decision-maker for Corkill. Dible also testified that Zervos told him he had "work lined up" for his new business, which to Dible meant that he had construction projects for which labor and materials could be supplied.

¶ 12 In early April 2006, Zervos submitted a completed credit application on behalf of Elcon and sent it to Steiner. Zervos also sent a check for \$9,135, which was dated March 28, 2006, with the credit application. Within the record on appeal, there is an invoice statement from Steiner to Elcon dated April 30, 2006 that contains charges in the amount of \$9,912.58 that accrued between April 13, 2006 and April 27, 2006. The \$9,135 is deducted on this statement. On May 19, 2006, Zervos resigned as an employee of Corkill.

¶ 13 Based upon the above facts, Corkill's September 29, 2009

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counterclaims for civil conspiracy assert that Steiner conspired with Zervos in starting a competing business while still employed by Corkill and using Corkill's money to purchase goods and services for the benefit of others by (1) having knowledge that Zervos intended to leave Corkill, (2) not telling Corkill about Zervos' plan to leave Corkill and (3) agreeing to sell products to Zervos' newly formed company, Elcon. Notably, the counterclaim does not contain any allegations that Elcon commenced business prior to Zervos' resignation and does not contain allegations that Steiner knew of Zervos' illegal activities, namely purchasing goods and services with Corkill's money for the benefit of Elcon and himself, improper use of Corkill's electrical permits for the benefit of others, making false entries in Corkill's books and erasing data from Corkill's computer system (collectively "illegal activities").

¶ 14 On April 3, 2012, Steiner filed a motion for summary judgment seeking judgment on its claims against Corkill as well as Corkill's counterclaims against Steiner. In support of its motion for summary judgment, Steiner attached an affidavit of Joseph Dible, which included the following statements:

"13. Neither I, nor any other Steiner employee that I know are aware of any existing or former Corkill employees who were

ordering products from Steiner for Zervos, Elcon, or for their own benefit in Corkill Electric's name.

14. Neither I, nor any other Steiner employee that I know had any knowledge of the existence of or any participation in Zervos' alleged Material Theft, including the LaStrada and HCR Manorcare jobs specified in the counterclaim.

15. Neither I, nor any other Steiner employee that I know had any knowledge that Corkill Electric was allegedly making payments for labor and materials used in construction projects where Elcon was receiving the benefits of such labor and material.

* * *

19. Neither I, nor any other Steiner employee that I know knew that Zervos was stealing from Corkill Electric. doing anything wrong [sic].

20. Beyond Zervos' pending resignation, Dible did not know that Zervos was doing

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anything that would harm Corkill Electric."

On July 11, 2012, after the motion for summary judgment was fully briefed and the trial court judge heard oral arguments, the trial court granted Steiner's motion for summary judgment in all respects and ordered Corkill to pay Steiner damages in the amount of \$445,537.78, plus finance charges, attorney fees, costs and expenses. At the hearing, the trial court judge made the following comments:

"[T]here are no facts here alleged that -- counsel says that out of the 175,000, only 15,000 was even placed after the secret meeting. But there is -- there were no facts that even \$15,000 though didn't go to Corkill. There is no evidence in the record of Steiner being aware of any type -- anything other than Mr. Zervos leaving, starting a new business. They're in business. They want to get customers. They don't want to get in the middle of this thing."

Corkill filed a motion to reconsider the court's July 11, 2012 order, which was denied on October 17, 2012. Corkill timely filed a notice of appeal seeking reversal of the trial court's

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July 11, 2012 order granting summary judgment in favor of Steiner and the trial court's October 17, 2012 order denying reconsideration of the July 11, 2012 order claiming that there is a genuine issue of material fact as to Steiner's participation in a conspiracy. For the reasons that follow, we affirm the trial court's order granting summary judgment in favor of Steiner.

¶ 15 ANALYSIS

¶ 16 Our standard of review of an order granting summary judgment is *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995). Summary judgment is properly granted where the pleadings, depositions, admissions, affidavits and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 30-31 (1999). Although summary judgment has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which "the right of the moving party is clear and free from doubt." (Internal quotation marks omitted.) *Steiner Electric Co. v. NuLine Technologies, Inc.*, 364 Ill. App. 3d 876, 880 (2006).

¶ 17 I. Issues Waived on Appeal

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¶ 18 At the outset, we note that Corkill's notice of appeal² states that it is appealing the trial court's July 11, 2012 order, which granted Steiner's motion for summary judgment on Steiner's claims against Corkill as well as on Corkill's counterclaim against Steiner, and the trial court's October 17, 2012 order denying Corkill's motion to reconsider. On appeal, Corkill only offers arguments in connection with the trial court's grant of summary judgment in favor of Steiner on Corkill's counterclaim of civil conspiracy.³ Accordingly, because Corkill does not offer any arguments regarding the trial court's ruling granting summary judgment in favor of Steiner on Steiner's claims against Corkill, and no arguments regarding the trial court's October 17, 2012 order denying Corkill's motion to reconsider, we affirm those judgments. See Ill. Sup. Ct. R. 341 (eff. 1967). In turn, we address Corkill's arguments regarding the trial court's grant of summary judgment on Corkill's counterclaim of civil conspiracy against Steiner.

² An amended notice of appeal was also filed. The only difference in the amended notice was the addition of Gary Corkill as a appellant in this matter.

³ Similarly, under Corkill's "Nature of the Case" section of its appellant brief, it states "This is an appeal from an order of Summary Judgment entered in favor of Steiner Electric Company ("Steiner") and against Corkill Electric Company ("Corkill") on Corkill's counterclaim for conspiracy to breach fiduciary duties."

¶ 19 II. Civil Conspiracy

¶ 20 In it's counterclaim, Corkill alleges that Steiner is guilty of participating in a civil conspiracy by assisting Zervos to breach his fiduciary duty to Corkill and seeks to recover damages as a result of the breach of fiduciary duty. Civil conspiracy consists of a combination of two or more persons working together for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means.

Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 62 (1994). The necessary elements of civil conspiracy include: (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties; and (4) the overt act was done pursuant to and in furtherance of the common scheme. *Vance v. Chandler*, 231 Ill. App. 3d 747, 750 (1992).

¶ 21 The "unlawful acts" that form the basis of Corkill's civil conspiracy counterclaim are: (1) "Zervos breached his fiduciary duties by forming Elcon and engaging in competition with Corkill," and (2) "Zervos further breached his fiduciary duties and defrauded Corkill by causing goods and services to be diverted from Corkill to the benefit of Elcon or Zervos personally."

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¶ 22 Before we determine whether Steiner engaged in a civil conspiracy, we must determine first whether Zervos breached a fiduciary duty. With respect to the first alleged breach of a fiduciary duty, that Zervos started a competing business while still employed by Corkill, we find that Corkill failed to both plead and offer any evidence in support of this alleged breach of a fiduciary duty, thus making a claim of civil conspiracy impossible.

¶ 23 An employee may legitimately go so far as to form a rival corporation and outfit it for business while still employed by the prospective competitor. See *James C. Wilborn & Sons, Inc. v. Heniff*, 95 Ill. App. 2d 155 (1968); *Voss Engineering, Inc. v. Voss Industries, Inc.*, 134 Ill. App. 3d 632, 635-36 (1985). An employee is held accountable for breaching his fiduciary duty to his employer only when he goes beyond such preliminary competitive activities and commences business as a rival concern while still employed. *Lawter International, Inc. v. Carroll*, 116 Ill. App. 3d 717, 733-734 (1983).

¶ 24 It is undisputed that between January 1, 2006 and May 19, 2006, Zervos was an employee of Corkill.

¶ 25 Here, Corkill has failed to allege anywhere within its counterclaim a date on which Zervos' competing business, Elcon, commenced business. Because an employee must commence business

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prior to leaving his employer in order to breach a fiduciary duty, and that allegation is absent from Corkill's counterclaim, Corkill has failed to plead a breach of a fiduciary duty, thus precluding a claim of civil conspiracy on this basis alone.

¶ 26 Nevertheless, upon review of the record before us, while it is clear that prior to his resignation from Corkill, Zervos incorporated Elcon, had worked lined up for Elcon and had purchased products in preparation for construction jobs, these facts merely show that Zervos was forming and outfitting his company while still an employee of Corkill, and such actions do not amount to a breach of a fiduciary duty.

¶ 27 Here, there is no evidence in the record to show that Elcon commenced business prior to Zervos' resignation. "It is recognized that an employee, absent a restrictive contractual provision, has a right to enter into competition with the former employer upon leaving such employ. *Voss Engineering, Inc.*, 134 Ill. App. 3d at 635; see *Cross Wood Products v. Suter*, 97 Ill. App. 3d 282 (1981). Because Corkill has failed to plead and show any evidence that Elcon commenced business prior to Zervos' resignation, he has failed to plead and show any evidence of a breach of a fiduciary duty or unlawful act which is an essential element of a civil conspiracy. As such, Corkill cannot prove a civil conspiracy, and Steiner is entitled to summary judgment on

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Corkill's allegations that Steiner assisted Zervos to breach a fiduciary duty by not revealing to Corkill that he was forming a competing business.

¶ 28 With respect to the second alleged breach of a fiduciary duty, that Zervos engaged in illegal activities while employed by Corkill, it is undisputed by the parties that such actions are illegal and do amount to a breach of a fiduciary duty. However, because we find that Corkill failed to plead and show any evidence that Steiner had any knowledge of Zervos' illegal activities, Steiner is entitled to judgment on this allegation as well.

¶ 29 In order to be guilty of a civil conspiracy, one must knowingly and voluntarily participate in a common scheme to commit an unlawful act or a lawful act in an unlawful manner. *Adcock*, 164 Ill. 2d at 64. Here, nowhere within Corkill's counterclaim does it allege that Steiner was aware of Zervos' illegal activities at any time. Absent such allegations of Steiner's knowledge of the illegal activities, Corkill's civil conspiracy claim fails on this basis alone.

¶ 30 Nevertheless, even if we review the evidence in the record before us, there is no evidence that shows Steiner was aware of Zervos' illegal activities. To the contrary, in the affidavit of Joseph Dible, he states:

"13. Neither I, nor any other Steiner employee that I know are aware of any existing or former Corkill employees who were ordering products from Steiner for Zervos, Elcon, or for their own benefit in Corkill Electric's name.

14. Neither I, nor any other Steiner employee that I know had any knowledge of the existence of or any participation in Zervos' alleged Material Theft, including the LaStrada and HCR Manorcare jobs specified in the counterclaim.

15. Neither I, nor any other Steiner employee that I know had any knowledge that Corkill Electric was allegedly making payments for labor and materials used in construction projects where Elcon was receiving the benefits of such labor and material.

* * *

19. Neither I, nor any other Steiner employee that I know knew that Zervos was stealing from Corkill Electric. doing

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anything wrong [sic].

20. Beyond Zervos' pending resignation, Dible did not know that Zervos was doing anything that would harm Corkill Electric."

Further, the fact that Dible thought Zervos was a trusted employee of Corkill, knew Zervos was still employed by Corkill when they discussed him leaving Corkill and starting a new business, and knew that Zervos had work lined up for his new business as of March 2006, does not in any way show that Steiner had any knowledge of Zervos' illegal activities. Thus, because Corkill has failed to plead and show any evidence that Steiner had any knowledge of Zervos' illegal activities, Corkill cannot prove civil conspiracy and Steiner is entitled to summary judgment on Corkill's civil conspiracy counterclaim.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Steiner on Corkill's counterclaims of civil conspiracy.

¶ 33 Affirmed.