**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

DATE: 04/27/2011 TIME: 10:39:00 AM DEPT: C19

JUDICIAL OFFICER PRESIDING: Charles Margines
CLERK: Nanci Turner-Mitani
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: Richard A Simmer

CASE NO: **30-2008-00110031-CU-BC-CJC** CASE INIT.DATE: 07/31/2008
CASE TITLE: **SASCO vs. Rosendin Electric, Inc.**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT ID/DOCUMENT ID: 71224139
EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

Having taken the matter under submission, and having considered the papers and arguments of counsel, the court now rules as follows on Defendant Rosendin Electric, Inc.'s motion for attorneys' fees and costs –

Plaintiff SASCO and Defendant Rosendin Electric, Inc. are large electrical subcontractors that compete with one another for jobs. Defendants Doug Fitzsimmons, Cliff Thompson and Jon Woodworth were employed by Plaintiff in senior management positions. All three resigned and joined Defendant Rosendin by November 2006. Plaintiff has alleged that the individual Defendants took Plaintiff's trade secret information with them, including Plaintiff's unique estimating and job costs systems. Plaintiff has further alleged that Defendants misappropriated the trade secrets by applying the system at Rosendin. This system is a computer program that provides monthly construction reports.

The complaint alleged 1) misappropriation of trade secrets; 2) intentional interference with prospective economic advantage; 3) violations of B&P §17200; 4) breach of contract; and 5) breach of implied covenant of good faith and faith dealing.

Plaintiff dismissed the second and third causes of action two weeks before a motion for judgment on the pleadings was scheduled to be heard.

Defendants filed a motion for summary judgment or summary adjudication on May 1, 2009. The hearing on the motion never took place. The last hearing date was set for November 17, 2010, making Plaintiff's opposition due on November 3, 2010. However, Plaintiff voluntarily dismissed the entire action without prejudice on October 20, 2010.

Pursuant to CCP § 3426.4, Defendants move for attorneys' fees in the amount of $516,425.46.

Plaintiff not only opposes the motion but seeks to recover attorneys' fees of its own for the opposition.

Moving parties contend as follows:

Plaintiff brought this lawsuit in bad faith, and the lawsuit has never been either objectively or subjectively tenable. Plaintiff's CEO has spearheaded a campaign of meritless litigation against former SASCO employees and their new employer, Rosendin.

A. Objectively Specious

The action at bar is objectively specious because (1) it superficially appears to have merit but there is no evidence to support the claim and (2) opposing counsel identified specific shortcomings but Plaintiff moved forward with suit anyway. *See Gemini Aluminum Corp. vs. California Custom Shapes, Inc.* (2002), 95 Cal. App. 4th 1249, 1261. Objective bad faith is also demonstrated by evidence that Plaintiff had an anticompetitive motive in filing suit. *See FLIR Systems, Inc. vs. Parrish* (2009), 174 Cal. App. 4th 1270, 1276.

Before commencing discovery, Plaintiff refused to identify the purportedly misappropriated trade secret, in violation of CCP § 2019.210.

The alleged trade secret in this case was nothing other than a standard computer program used by thousands of businesses.

Over its 90-year history, Defendant Rosendin Electric developed its own system for estimating, budgeting, and monitoring job costs, using the Accubid and Oracle systems. Plaintiff used a different program, one that is widely available in the construction industry, called the McCormick System. The individual defendants never altered Rosendin's system programs after coming to work for Rosendin.

Plaintiff claimed in this action that Defendants' actions caused a bid awarded to Plaintiff to be rescinded, costing Plaintiff in excess of $3,000,000. But in fact, Plaintiff was never awarded the contract, its bid being far too high. This fact was plainly evident as early as May 2009, but Plaintiff pressed this case forward anyway.

When Plaintiff's president was deposed on February 4, 2009, he admitted that he had no evidence to support the claim of misappropriation of trade secrets.

Plaintiff disobeyed court orders compelling discovery, resulting in sanctions.

Defendants moved for judgment on the pleadings in April 2010. Two weeks before the hearing date, Plaintiff dismissed the second and third causes of action.

Although Defendants filed an MSJ/MSA on May 1, 2009, with a hearing set for July 22, 2009, Plaintiff managed to delay the hearing for over a year. The last hearing date had been scheduled for November 17, 2010. The opposition was due on November 3, 2010. Rather than opposing, Plaintiff dismissed the rest of the action without prejudice on October 20, 2010.

B. Subjectively Frivolous

In addition to being objectively specious, Plaintiff's lawsuit was subjectively frivolous. Plaintiff has prosecuted a series of meritless suits rehashing sham arguments against Defendant Rosendin Electric and former SASCO employees, the main individual target being Defendant Woodworth. After Woodworth left SASCO, Plaintiff tried to deprive him of vested benefits under ERISA. Woodworth and another ex-employee were forced to file suit. SASCO responded by filing three suits against the former employees: the instant action (filed July 31, 2008); a negligence action (filed in this court October 24, 2008) against Woodworth (case no. 2008-113732); and an action for negligent misrepresentation, breach of fiduciary duty, and breach of contract against Defendants Woodworth and Thompson as well as other ex-employees (filed in this court on November 25, 2009; Case no. 2009-323535). Woodworth has since been dismissed from the third lawsuit, but Thompson has not. As for the second lawsuit, a request for dismissal was filed on September 17, 2009.

In the federal ERISA case, the district court eventually found against SASCO and awarded attorneys' fees in the amount of $568,573.32, using a multiplier of 1.5 as punishment because SASCO asserted belated offset claims supported by very little evidence and because SASCO attempted to wear down the opposing parties by filing "duplicative and costly satellite litigation in two different forums."

Despite the district court's findings, SASCO filed the third lawsuit (described above) two and a half months later.

Less than two weeks after SASCO dismissed the case at bar, SASCO subpoenaed Defendant Rosendin's business records through the third lawsuit. This is another clear attempt to disrupt Defendant Rosendin's business. The subpoena has been quashed in part.

Subjective bad faith in this case is also demonstrated by the facts that (1) SASCO sought an injunction when it was never entitled to one; and (2) SASCO only engaged in settlement discussions when the case was on the precipice of dismissal, and SASCO attempted to garner a settlement despite never having produced a single shred of evidence in the case.

C. Fee Amount

CCP § 3426.4 gives the Court broad discretion to award reasonable attorneys' fees for the misappropriation claim. No California case has held that fees can be awarded for related but non-CUTSA claims. At least one court has endorsed the application of the lodestar figure in CUTSA cases. *See Stilwell Development, Inc. vs. Chen*, case no. CV86-4487-GHK, 1989 WL 418783 (C.D. Cal. Apr. 25, 1989). This decision is discussed and relied on in *Gemini*, *supra*, 95 Cal. App. 4th at 1262.

The requested fee amount of $516,425.46 is reasonable. A fee amount of $380 for both partners and associates is reasonable, and as of October 29, 2010, 1,374 hours had been spent defending the case, which amounts to $522,120 for legal fees at the given rate. In addition, Defendants calculate spending 105 hours on the motion at bar, which figures to be $39,900 at the given rate.

Defendants recognize that a reduction is in order to account for the non-CUTSA causes of action. But it is nearly impossible to segregate the two categories, and the focus of this case has always been the trade secrets. Therefore, a 10% reduction for the other causes of action is appropriate.

Responding party contends as follows:

Plaintiff's complaint was well founded and well researched.

Plaintiff fully and completely identified its trade secret claims on three separate occasions, in accordance with CCP § 2019.210. This action concerned Defendants' misappropriation of SASCO's estimating, bidding, job costing, and project management systems. The process (1) is embodied in the software SASCO's 14-person programming department customized, developed, or created, (2) can be reviewed through hundreds of computer-generated custom reports, which (3) can be printed out in paper form.

Plaintiff fully intended to litigate this case on its merits, but Defendants (1) never produced any documents in response to Plaintiff's discovery requests, despite being ordered to do so by the court; and (2) declined to participate in further discussions with the court-appointed discovery referee; they also refused to allow the referee to render an opinion to this court as to whether a trade secret exists and regarding what categories of documents the parties needed to produce.

The MSJ/MSA that Defendants filed on May 1, 2009, was clearly frivolous in light of the fact that they had not produced a single document in the action.

Plaintiff requested dismissal on October 20, 2010, because it was fed up and worn down by Defendants' discovery abuses and tactics.

In mid-2010, SASCO and Defendants discussed discovery matters and also entered into settlement talks.

Defendants' motion for fees should not be granted for the following reasons: First, the law requires that Defendants establish that SASCO's lawsuit was objectively specious, and Defendants cannot do this. Defendants would need to prove that there is a complete lack of evidence supporting Plaintiff's claim. Here, at least one large project slated for SASCO went to Rosendin after the individual Defendants (1) left SASCO; (2) went to work for Rosendin; (3) participated in the bidding process on behalf of Rosendin with full knowledge as to the projections that had gone into SASCO's bid; and (4) objectively or subjectively provided SASCO's confidential and proprietary trade secret information to Rosendin.

The individual Defendants have not denied that they did not (1) take paper copies of the reports generated by SASCO's proprietary software system; (2) provide those printed reports to their new employer or other third parties (including potential customers); or (3) use those printed reports in order to assist in the preparation of bids for Rosendin.

Second, Defendants fail to establish that SASCO pursued this action with subjective bad faith. The parties never litigated the action on the merits because Defendants violated a court order, engaged in dilatory discovery tactics, and never produced a single document.

Third, Defendants are not the prevailing party. A voluntary dismissal early in the case – i.e., prior to receiving any substantive discovery – does not mean that the dismissed party has prevailed. *See* CCP § 3426.4; *Gilbert vs. Nat'l Enquirer* (1997), 55 Cal. App. 4th 1273. Defendants do not even mention this requirement in their moving papers because they know that they cannot meet it.

Fourth, even assuming Defendants could meet the previous requirements, their fee request is bloated and deceptive. Their attorneys do not appear to have any experience on trade secret matters, so some of the fees should be written off due to lack of experience and resulting inefficiencies. If the Court were to grant fees, they should be no more than $68,756.98.

Defendants should be ordered to show cause as to why the Court should not award Plaintiff attorneys' fees under CCP § 128.7(b) and (c) for having to respond to this motion, given the fact that Plaintiff's argument is built around the blatant falsity that Plaintiff used an off-the-shelf computer program, not a custom-designed one.

<u>In reply, moving parties contend as follows</u>:

[Although the reply is summarized herein, the court grants Plaintiff's motion to strike it because it was filed and served after the agreed-upon filing date]

SASCO's filing of the action and its continued prosecution of the case for 17 months after Defendants' MSJ/MSA was filed shows objective bad faith.

The Verizon-Tustin project on which Plaintiff bid and claims it lost as a result of the purported misappropriation of trade secrets is not the same as the Verizon-Tustin project that Defendant Rosendin ultimately won.

SASCO failed to identify any trade secret or provide any evidence that Defendants misappropriated anything. There was no misappropriation. SASCO cannot tie the loss of the Verizon-Tustin project to the alleged misappropriation. Defendants argued these contentions in their MSJ, and Plaintiff never attempted to prove otherwise.

By late September 2009, SASCO was on clear notice that (1) none of the individual defendants took any software or documents or forwarded e-mails from SASCO; (2) the corporate Defendant and Plaintiff used two separate, off-the-shelf software programs; and (3) SASCO was not awarded the reduced-size Tustin-Verizon job because it was the second highest bidder.

Defendants' counsel informed Plaintiff's counsel of the flaws in Plaintiff's case more than a year before Plaintiff dropped the suit.

The declarations from Rosendin's employees Arriola, Draper, and Erwin prove that SASCO commenced and maintained the suit without probable cause.

There is no evidence to support Plaintiff's attempt to neutralize its CEO's testimony.

In opposition to this motion for sanctions, SASCO's attorney Thomas Speiss submitted a declaration in which he describes in greater detail what constitutes the trade secret at issue. This identification, made years after the case was filed, is additional proof of subjective bad faith.

Defendants are entitled to fees because they are the prevailing parties, *i.e.*, the ones who realized their litigation objectives, in contrast to Plaintiff. Plaintiff's litigation objective has only been to harass Defendants.

<u>Analysis</u>:

CCP § 3426.4 provides, "If a claim of misappropriation is made in bad faith . . . , the court may award reasonable attorney's fees and costs to the prevailing party." In *FLIR Systems, Inc. vs. Parrish* (2009), 174 Cal.App.4th 1270, the appellate court explained the test which a court must employ to determine if such claim was made in bad faith:

"Although the Legislature has not defined 'bad faith,' our courts have developed a two-prong standard: (1) objective speciousness of the claim, and (2) subjective bad faith in bringing or maintaining the action, i.e., for an improper purpose. [citations] Section 3426.4 authorizes the trial court to award attorney fees as a deterrent to specious trade secret claims. [citation] Because the award is a sanction, a trial court has broad discretion in awarding fees. [citation]

On appeal from [an order awarding attorney's fees and costs], the appellant has an "uphill battle" and must overcome both the 'sufficiency of evidence' rule and the 'abuse of discretion' rule.

Objective speciousness exists where the action superficially appears to have merit but there is a complete lack of evidence to support the claim.

Subjective bad faith may be inferred by evidence that appellants intended to cause unnecessary delay, filed the action to harass respondents, or harbored an improper motive. [citation] The timing of the action may raise an inference of bad faith. [citation] Similar inferences may be made where the plaintiff proceeds to trial after the action's fatal shortcomings are revealed by opposing counsel."

(at 1275-1278)

As Plaintiff pointed out in its opposition papers, there is a preliminary question that must be answered before beginning the two-pronged analysis: Who is the prevailing party? The definition of "prevailing party" for purposes of attorneys' fees differs from the definition of "prevailing party" for purposes of determining costs. *Heather Farms Homeowners Ass'n vs. Robinson* (1994), 21 Cal. App. 4th 1568, 1572. With regard to attorneys' fees, a trial court has the discretion to conclude that there is no prevailing party. *See Gilbert vs. Nat'l Enquirer, Inc.*(1997), 55 Cal. App. 4th 1273, 1277. In determining the "prevailing party," the court should ignore rigid definitions and instead examine who prevailed on a practical level. *Heather Farms*, *supra,* at 1574.

The court finds that Defendants are the prevailing parties. Put simply, they achieved their litigation objective and Plaintiff did not.

As for the crux of the motion, whether Plaintiff's claim was made in bad faith, the court finds the following facts to be dispositive:

1. When this lawsuit was filed, Plaintiff did not possess any evidence that any of the individual Defendants, or Rosendin, misappropriated its trade secrets (and for purposes of resolving this motion, the court accepts Plaintiff's assertion that its computer program was indeed a trade secret and not an "off the shelf" program used by many of Plaintiff's competitors, as moving parties claim). What Plaintiff possessed, and all it possessed, was knowledge of the following sequence of events, as set forth in its opposition to this motion: "[T]he Verizon Tustin project [was awarded] to Rosendin after the SASCO former employee Defendants: (1) left SASCO; (2) went to work for Rosendin; (3) knowing how SASCO bid Verizon Tustin project, including all current and future labor and materials projections that went into SASCO's original bid, then participated in Rosendin's bidding process for this project; (4) objectively or

subjectively provided SASCO's confidential and proprietary trade secret information to Rosendin; and, (5) Rosendin ultimately won the bid" (at page 21, lines 17-22). The evidence presented by the parties makes clear that the factual assertion that Defendants, "objectively or subjectively provided SASCO's confidential and proprietary trade secret information to Rosendin" was, and is, no more than Plaintiff's belief. SASCO's loss of the contract to Rosendin raised a suspicion that its trade secret must have been divulged by its former employees and utilized by Rosendin. When the instant complaint was filed, however, the suspicion remained just that – a belief unsupported by any facts. Of course, a suspicion is not the functional equivalent of evidence.

Plaintiff may argue that its suspicion supported the filing of this lawsuit because ascertaining whether or not its trade secrets were misappropriated would necessarily require conducting discovery, a process which cannot take place before litigation is commenced. However, it is clear that Plaintiff could have conducted further investigation to ascertain the truth. For example, it could have commissioned a forensic examination of its computers, an examination which might have revealed that one or more of the three individual defendants downloaded its trade secrets just prior to leaving its employ, and for no legitimate reason. Or, even more simply, it could have contacted Mr. Joe Martino to learn why it did not win the Verizon Tustin contract (See #3, *infra*).

2. Well into the discovery process, Plaintiff still did not have any evidence that the Defendants, or any of them, misappropriated its trade secrets. If anyone associated with Plaintiff would have knowledge – directly or through others – that Defendants stole Plaintiff's trade secrets, it would be Plaintiff's CEO, Mr. Larry Smead. At his deposition, Mr. Smead testified as follows: "Q Do you have any actual evidence that [the three individual Defendants] took any Excel ROC'M -- A No -- Q --documents? A -- I don't. Q Okay. Are you claiming in this case that they did? A Yes, they – they have to prove they didn't, why wouldn't they. Q I think it's opposite of that. That's a legal question. A Well, there's two choices, that they either took it or they're stupid. Now, fine, if we want to admit that they're stupid, so they wouldn't take it, but why wouldn't they take it, well they would take it because I signed this and therefore I shouldn't take it, I guess, that would be their answer, okay, well, what do you – let me see your recap that you use, and I – I'll bet it looks a lot like SASCO's .... Q Do you have evidence that either Jon Woodworth or Cliff Thompson or Doug Fitzsimmons took the MOCRAT system with them to Rosendin? A No" (Exhibit 6 to moving parties' RJN, pp. 80-82). Plaintiff's attempt to explain away this devastating piece of evidence in footnote 7 of its opposition is, to put it charitably, feeble and betrays the weakness of its position. At the hearing, Plaintiff also claimed that Mr. Smead was not even talking about the trade secrets at issue herein. However, the portion of his deposition quoted *supra* makes clear that indeed he was.

3. Plaintiff's suspicions, as set forth *supra*, were wholly refuted by Joe Martino, VP of Howard S. Wright Constructors in his declaration in support of Defendants' motion for summary judgment (Exh. 6 to moving parties' RJN, pp. 63-64). As Mr. Martino declared, Howard S. Wright Constructors invited Plaintiff to submit a budget for a portion of the Verizon Tustin Project but did not enter into a contract with Plaintiff for the work or even provide Plaintiff with a letter of intent. Thereafter, the scope of the Project was reduced, rendering Plaintiff's budget irrelevant. Mr. Martino then solicited bids from four companies, including Plaintiff and Rosendin. The bids came in as follows: 1. CSI -- $1,420,000; 2. Rosendin -- $1,598,000; 3. Morrow Meadows -- $1,685,000; and 4. SASCO -- $2,025,000. Howard S. Wright Constructors did not even consider Plaintiff's bid to be "in the ballpark" because it was so much higher than the next highest bid. The reason that Rosendin was awarded the contract is because CSI was already working on another project for Verizon, and Verizon did not want the same subcontractor working simultaneously on two of its projects. Thus, there was nothing nefarious about Plaintiff's loss of its bid on the Project.

The loss of the Verizon Tustin Project was the centerpiece of Plaintiff's damages claim in the instant lawsuit. The complaint filed by SASCO contains no other specific instances where any of the individual Defendants allegedly utilized its trade secrets while in the employ of Rosendin.

4) In May of 2009, Plaintiff was served with Defendants' motion for summary judgment, which included the declaration of Mr. Martino. It was thus on notice that no factual basis existed for its claim that it lost the Verizon Tustin Project due to improper actions by Defendants. Nevertheless, it continued to prosecute this lawsuit for almost another year and one half.

5) Plaintiff prosecuted other lawsuits against Defendants and took other actions against them. As a result of one such action, Defendant Woodworth filed his own action against Plaintiff. The history of these other lawsuits is set out in moving parties' memorandum of points and authorities at pp. 8-10 and exhibits referred to therein. Suffice it to say that the acts of Plaintiff in those other litigations reflect not simply an effort to vindicate its legitimate rights but an attempt to wear down Defendants with multiple costly litigations. Plaintiff's tactics belie its claim that it dismissed the instant lawsuit because it became "fed up with and worn down by Defendants' discovery abuses and tactics, and [desired] to cut its losses."

6) Even today, Plaintiff offers no evidence to support its claim of trade secrets misappropriation. In its opposition to the motion, Plaintiff claims that it "had, ***and still has***, an objective and strong case that Defendants misappropriated SASCO's trade secrets. See, *supra*, p. 5:20-12:28" (emphasis in original). That is simply not the case. Plaintiff's claim of trade secret misappropriation, set out in the seven pages referred to herein, is still nothing more than the sequence of events detailed *supra*.

The court finds that Plaintiff's claim of trade secret misappropriation completely lacked evidence from the commencement of the lawsuit through its voluntary dismissal. The court also finds that Plaintiff's claim was prosecuted in bad faith. Thus, an award of reasonable attorneys' fees and costs is warranted.

The court finds that moving parties are entitled to attorneys' fees at the hourly rate of $360.00. As for the number of hours, the court reduces the hours claimed by: A. 15 hours spent on the reply which the court has struck; and B. 10% of the resulting total, for work performed on the non-CUTSA claims. The court thus awards to moving parties fees of $474,336 and costs of $10,607.46, for a total of $484,943.46.

Court orders Clerk to give notice.

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