

Advanced Integration Systems, Pandora Security and Pandora Advanced Integration Security (“Vorst”) on April 10, 2012 and April 11, 2012; and the Court having heard fact and expert testimony at the trial/proof hearing; and the Court and having reviewed the evidence submitted at the trial/proof hearing; and the Court having reviewed all post-trial/proof hearing submissions; and for good cause shown;

IT IS, on this 2nd day of January, 2013,

ORDERED as follows:

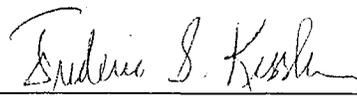
1. ~~FINAL~~ JUDGMENT is entered in favor of B&H and against **Poisler** in the amount of \$ 737,087.00;

2. DEFAULT JUDGMENT is entered in favor of B&H and against **Pinkney, AIS and Vorst, jointly and severally**, in the amount of \$ 737,087.00, ^{for compensatory damages} and punitive damages in the amount of \$100,000.00;

3. Poisler, Pinkney, AIS and Vorst shall pay B&H’s attorneys’ fees and costs incurred in connection with this litigation (or such appropriate portion as the Court may determine), to be included in a Supplemental Judgment, which shall be entered after the submission by B&H’s counsel of a Certification of Services, which shall be submitted within 21 days of receipt hereof; *and defendants may submit opposition within 10 days after service of said Certification;*

4. The counterclaims and third-party claims asserted by Pinkney, AIS and Vorst are DISMISSED with prejudice; and

5. A copy of this Order shall be served on all remaining defendants within 7 days of receipt by B&H’s counsel.



FREDERIC S. KESSLER, J.S.C.

*Reasons set forth by
letter opinion dated 1/2/13*

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
FREDERIC S. KESSLER
JUDGE



COURTHOUSE
ELIZABETH, NEW JERSEY
07207

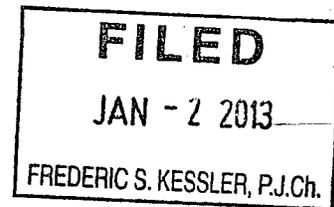
LETTER OPINION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

January 2, 2013

Brian D. Spector, Esq.
Spector & Ehrenworth, P.C.
30 Columbia Turnpike
Florham Park, NJ 07932

Mr. Michael Poisler
62 Van Reipen Avenue
Jersey City, NJ 07306



RE: B&H Securities, Inc. v. Duane D. Pinkney, et al.
Docket No.: UNN-L1292-09

Dear Mr. Spector and Mr. Poisler:

This case came before the court on April 10 and 11, 2012 for a trial between plaintiff, B&H Securities, Inc. ("plaintiff" or "B&H"), and defendant Michael Poisler ("Poisler"). The trial also served as a proof hearing with respect to claims against defendants Duane Pinkney ("Pinkney"), Advanced Integration

Security, L.L.C. ("AIS"), and the Vorst Group, Inc. ("Vorst").¹ Notice of the trial/proof hearing was provided to Pinkney, AIS, and Vorst, but they failed to appear.

Seven witnesses were called by plaintiff to testify. They included two officers of B&H, Eliot Barry and Kevin Oliver; former employees and defendants Marc Palladino² and Michael Poisler; and three expert witnesses, Benjamin Wingard, James Frackoviak, and Lawrence Chodor. Defendant Poisler also testified on his own behalf, but did not present any other witnesses.

This opinion takes into account all of the testimony at trial, the exhibits placed into evidence, and excerpts of the deposition of Pinkney offered by plaintiff. The court has also considered the arguments made by Mr. Spector and Mr. Poisler during trial, as well as the pretrial and post-trial submissions on behalf of plaintiff. No written submissions were received from Mr. Poisler.

Findings of Fact

B&H is a New Jersey corporation that has been in business for more than 30 years. Eliot Barry ("Barry") is the president of B&H, and he has been the sole shareholder since 1987.

B&H provides security and safety systems to various types of businesses. It operates primarily in New Jersey, but also has customers in thirteen other

¹ Default was entered against AIS and Vorst due to their failure to retain an attorney, as required by R. 1:21-1(c) and this court's order dated February 22, 2012. Default was entered against Pinkney in accordance with this court's order dated March 30, 2012 after he failed to appear for the pretrial conference or trial.

² Palladino was an original defendant, but entered into a settlement with plaintiff prior to trial. All claims asserted by plaintiff and Palladino against one another have been dismissed.

states. Its services include the creation, installation, maintenance, and inspection of security systems for buildings and business records.

According to Barry, all of the information that B&H deals with is sensitive. This includes the identities of clients, their access codes, central station codes, and plans for what is secured. The customized solutions, which involve assembly of equipment from various vendors, are also deemed confidential. Because the nature of the business is protection, it is obviously harmful if a competitor has access to such information.

B&H takes precautions to maintain the confidentiality of its information. It applies security to its own offices and computers systems. It also provides employees with a handbook (P-43) containing a Non-Disclosure/Confidentiality section.

B&H hired Pinkney in or about May 2005 as a salesman. Upon commencing employment, Pinkney signed an Acknowledgement (P-21) dated May 2, 2005 in which he agreed to maintain the confidentiality of B&H's information and not to contact B&H customers for 48 months after termination of employment. As a salesman, Pinkney had access to virtually all of the confidential information relating to his customers. He also served for a period of time as a regional sales director, which gave him access to customer information of other salesmen.

Palladino was hired by B&H in or about October 2005 to provide customer support. He received a copy of the employee handbook and signed an acknowledgement (P-44) on April 27, 2006.

Poisler was hired in or about April 2006, at the recommendation of Pinkney, to serve as information technology manager. Although there was discussion between Poisler and Barry about the possibility of a bonus, no agreement as to a bonus was reached. Like other employees, Poisler received a copy of the employee handbook. He signed an acknowledgement of receipt (P-48) on July 26, 2006. He admitted at trial that he was aware of the non-disclosure provision in the handbook.

In the spring of 2007, Pinkney formulated a plan to start a business in competition with B&H. On or about June 4, 2007, Pinkney, Palladino, and Poisler signed an Operating Agreement (P-4) for AIS. The agreement provided for Pinkney and Palladino to each receive 47.5% of the company, with Poisler to receive the remaining 5% upon completion of certain computer work. As set forth in the agreement, the business of AIS was substantially similar to that of B&H. When they entered into the agreement, all three were still employed by B&H.

Even before forming AIS, Pinkney directly solicited DataPipe, Inc., one of B&H's largest customers, to do business with his new company. He did so while on a B&H-paid trip to DataPipe's office in San Jose, California. Also while at B&H, Pinkney devised a means to solicit another large customer, Liquidnet, which had entered into a five-year maintenance agreement with B&H. Without the knowledge of B&H management, Pinkney provided new agreements to Liquidnet that permitted it to cancel "with 30 days written notice" (P-52).

Also at this time, Pinkney purchased a personal laptop computer through B&H. During the course of the litigation, B&H learned that Pinkney had used this laptop to copy and take with him virtually all of B&H's confidential database. See P-40 and 40A. Although Pinkney allegedly "returned" this information to B&H, he told Palladino that he had preserved a copy on an external hard drive and then placed everything on a new desktop computer.

Evidence also established that, while employed by B&H, Poisler took the LG Iris code that was custom written for DataPipe. He also transferred various e-mail accounts along with B&H's database to his laptop. According to B&H's computer expert, the full extent of Poisler's actions could not be determined because he had used three "data-wiping" programs to his computer. Poisler's denials of improper conduct were unconvincing.

In mid-June 2007, Pinkney advised B&H that he was resigning to form a new company and that he intended to solicit certain B&H customers. Barry reminded Pinkney that his restrictive covenant prohibited him from doing so. Shortly thereafter, Palladino submitted his resignation.

In August 2007, B&H terminated Poisler's services. Barry was suspicious about possible involvement of Poisler with Pinkney's plans, since Pinkney had recommended Poisler, and Poisler had access to B&H's entire database. B&H was unaware at the time that Poisler had a 5% contingent interest in AIS.

Eventually Palladino became distrustful of Pinkney and left AIS in or about September 2008. Poisler did work for AIS after leaving B&H, but did not meet the conditions for his 5% share, and severed his ties with AIS in or about March

2009. Pinkney was advised that he could not be the sole member of an LLC, and he therefore formed a solely-owned corporation, Vorst, which he regarded as “the same company.” As he stated during his deposition, “the Vorst Group is to me Advanced Integration Security. . . . I didn’t regard it as a different entity” (734:16-21).

Ultimately, four B&H customers left B&H and began conducting business with AIS: DataPipe, Liquidnet, Spirit, and Commercial Interiors Direct. The total sales lost for these customers, initially calculated for a period of 39½ months, amounted to \$1,363,059. Based upon a gross profit of 44.5%, as determined by plaintiff’s expert, Lawrence Chodor, B&H’s lost profit was \$606,560. Applying this to the full 48 months of Pinkney’s restrictive covenant results in a lost profits calculation of \$737,087.³ B&H also incurred substantial legal fees, technology investigation costs, and related expenses.

Conclusions of Law as to Pinkney, AIS, and Vorst

To the extent that this case has proceeded by way of proof hearing against defendants Pinkney, AIS, and Vorst, the standard of proof is simply the prima facie showing of the legally required elements of plaintiff’s claim for relief. Heimbach v. Mueller, 229 N.J. Super. 17, 23 (App. Div. 1988). See also Pressler & Verniero, Current N.J. Court Rules, comment 2.2.2 on R.4:43-2 (“the judge should ordinarily apply to plaintiff’s proofs the prima facie case standard of R.

³ Chodor alternatively calculated the profits that AIS would have received based upon industry data reflecting a gross profit of 48.6%. However, this court deems it unlikely that AIS, as a start-up company, could attain a profit percentage equal to the industry average and greater than that of B&H. The court therefore rejects the alternative calculation.

4:37-2(b) and R.4:40-1, thus not weighing evidence or finding facts but only determining bare sufficiency”).

Furthermore, while a variety of claims are asserted against these defendants, the compensatory damages sought pursuant to each claim are the same. Thus, plaintiff is entitled to recovery if its proofs are sufficient as to any of the claims asserted.

There can be no doubt that B&H has established the necessary prima facie case against Pinkney. The evidence is clear that:

- - Pinkney breached his duty of loyalty to his employer by setting up a competing company, altering a key contractual provision with one of B&H's largest customers, and soliciting another major customer - - all while he remained in the employ of B&H. See Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 302 (2001). These acts also constituted tortious interference with contractual relations and prospective economic advantage, Singer v. Beach Trading Co., Inc., 379 N.J. Super. 63, 81 (App. Div. 2005), and breach of his implied covenant of good faith and fair dealing. Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420-21 (1997).

- - Pinkney misappropriated confidential information belonging to B&H, taking with him virtually the entire database, which he then used to solicit B&H customers. See Lamorte Burns, supra at 298-301; Rycoline Products, Inc. v. Walsh, 334 N.J. Super. 62, 71 (App. Div. 2000).

- - By soliciting B&H's customers, Pinkney breached his restrictive covenant with B&H, which expressly prohibited him from contacting B&H customers for 48 months. See Community Hospital Group, Inc. v. More, 183 N.J. 36, 52 (2005).

- - Pinkney violated the Computer Related Offenses Act ("CROA"), N.J.S.A. 2A:38A-1 et seq., by purposefully and without authorization "taking" and "obtaining" B&H's computer database and using it to unfairly compete with B&H, thereby causing damage to B&H due to loss of customers. N.J.S.A. 2A:38A-3(a) and (e).

These claims are also applicable to AIS and Vorst. AIS was the entity through which Pinkney engaged in his tortuous conduct, and it was for the benefit of AIS that Pinkney committed his contractual breaches. The fruits of Pinkney's wrongdoing flowed to AIS. As for Vorst, by Pinkney's own admission, it was "the same company" as AIS, merely restructured (after Palladino and Poisler had departed) to comply with legal requirements for a solely-owned entity. It not only succeeded to the business of AIS, it even continued to use the AIS name. If Pinkney "didn't regard [Vorst] as a different entity," there is no reason for the court to do so.

The compensatory damages as to all of these claims are properly measured by plaintiff's lost profits. This is clearest as to the breach of the restrictive covenant. Since Pinkney was prohibited from engaging in competition for four years, it is reasonable to conclude that plaintiff would have retained the four customers at issue during that four-year period. The expert testimony established plaintiff's losses in the amount of \$737,087 with a reasonable degree

of certainty. Compensatory damages in that amount will be awarded against defendants Pinkney, AIS, and Vorst.

The court further finds that plaintiff is entitled to an award of punitive damages against those defendants. The proofs establish by clear and convincing evidence that Pinkney, on his own behalf and as a principal of AIS and Vorst, acted with a wanton and willful disregard of the harm that he was causing to plaintiff. N.J.S.A. 2A:15-5.12(a). It was clear that his actions would cause serious harm to plaintiff, and he was plainly aware of that harm, but nevertheless pursued his unlawful conduct. N.J.S.A. 2A:15-5.12(b).

In determining the amount of the damages, the court must take into account various factors, including the financial condition of the defendants. N.J.S.A. 2A:15-5.12 (c). Recognizing the seriousness of the conduct, but also that these defendants have declared bankruptcy and are facing a substantial judgment, the court awards punitive damages in the amount of \$100,000 jointly and severally against defendants Pinkney, AIS, and Vorst.

Finally, plaintiff seeks an award of attorneys' fees and costs under CROA. While the statute provides for a reasonable attorney's fee, together with costs of investigation and litigation, the amount cannot be determined until counsel has submitted a certification of services. The judgment will provide for submission of such certification.

Conclusions of Law as to Poisler

As to Poisler, who did not default, plaintiff bears the burden of proof by a preponderance of the evidence. The court is required to assess the credibility of

the witnesses. All of plaintiff's witnesses, both fact and expert, were clear and believable in their testimony. By contrast, Poisler's efforts to distance himself from the actions of Pinkney and Palladino came across as self-serving and unconvincing. He could not overcome the clear evidence that he was a signatory to the AIS Operating Agreement, yet he continued to work at B&H for months thereafter. He did not have satisfactory explanations for downloading e-mail files and other data to his computer.

It can be inferred that Poisler cooperated with Pinkney in taking computer data from B&H. It is doubtful that Pinkney could have stolen B&H's database on his own. While Palladino could not confirm that Poisler assisted Pinkney, he testified that Pinkney would have needed assistance to obtain the data. Nobody was in a position to provide such assistance except Poisler, the information technology manager who had been hired on Pinkney's recommendation and held a contingent interest in AIS.

The court was persuaded by plaintiff's computer experts that Poisler deleted all data from his personal computer by using three different data-wiping programs. This prevented plaintiff from ascertaining what data Poisler had taken from B&H. It warrants a spoliation inference. See Rosenblit v. Zimmerman, 166 N.J. 391, 401 (2001). However, even without drawing an adverse inference, the court finds that plaintiff has met its burden of proof by a preponderance of the evidence.

In particular, Poisler breached his duty of loyalty to his employer. Lamorte Burns, supra, 167 N.J. at 303 ("an employer may prove a prima facie case of an

employee's breach of the duty of loyalty not only by showing that the employee directly competed with the employer while employed, but also by showing that the employee while employed assisted the employer's competitor"). He also violated his implied covenant of good faith and fair dealing that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Sons of Thunder v. Borden, Inc., supra, 148 N.J. at 420.

Additionally, by taking confidential data and assisting Pinkney in obtaining such information for use on behalf of AIS, Poisler breached his non-disclosure provision and misappropriated confidential information. Because the court finds that he did so knowingly and without authorization, his actions violated CROA. N.J.S.A. 2A:38A-3(a).

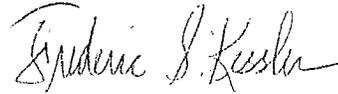
The compensatory damages that flow from these claims are the same lost profits previously discussed, as testified to by plaintiff's damages expert. Poisler offered no contrary evidence as to damages. Thus, damages will be awarded against Poisler in the amount of \$737,087. Attorneys' fees and costs pursuant to CROA may be assessed upon consideration of plaintiff's certification of services.

Punitive damages are also requested against Poisler. While plaintiff's proofs satisfy the preponderance of evidence required to establish liability and compensatory damages, punitive damages require clear and convincing evidence that the defendant's acts were actuated by malice or accompanied by wanton and willful disregard. N.J.S.A. 2A:15-5.12(a). The court concludes that

this higher threshold has not been met. Punitive damages are therefore denied as to Poisler.

A judgment memorializing the decisions contained herein is enclosed.

Very truly yours,

A handwritten signature in cursive script that reads "Frederic S. Kessler". The signature is written in dark ink and is positioned above the printed name.

Frederic S. Kessler, P.J.Ch.