J-A02005-13

2013 PA Super 130

PTSI, INC. Appellant v. COLE HALEY, ANTHONY PIROLI AND EVOLUTION SPORTS INSTITUTE LLC, A PA LIMITED LIABILITY COMPANY Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 684 WDA 2012

Appeal from the Order entered April 2, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No: GD 11-009299.

BEFORE: SHOGAN, J., ALLEN, J., and WECHT, J.

CONCURRING OPINION BY WECHT, J.: FILED: May 24, 2013

I join the learned majority's opinion in full. I write separately to note just how close I believe the case to be. What gives me pause is the troubling breadth of Cole Haley's and Anthony Piroli's ("Appellees") at best irresponsible, at worst intentional, and in any event admitted, destruction of certain evidence undisputedly encompassed by the trial court's May 26, 2011 preservation order. In my view, the trial court opinion downplays Appellees' mis- or malfeasance. I believe the topic deserved greater attention from the trial court and warrants more attention from this panel.

Regarding the trial court's ruling on summary judgment, I find no legal error or abuse of discretion in the trial court's determination that PTSI, Inc.'s ("Appellant") proffered evidence in opposition to Appellees' motion for summary judgment failed to establish a genuine issue of material fact.

While Appellant's claims in this case might be established by circumstantial evidence alone, ***see Porter v. Joy Realty, Inc.***, 872 A.2d 846, 850 (Pa. Super. 2005), that does not mean that any modicum of suggestive evidence will suffice to establish a basis to proceed to trial.

As argued by Appellant, Appellees' business plan and appointment records certainly would be consistent with Appellees' improper solicitation of Appellant's clients to take their business to Appellees' new venture. However, Appellant named no fewer than fifty-five of its former clients who left Appellant to train with Appellees at their new facility, yet proffered no evidence whatsoever, in the form of affidavit or sworn deposition testimony, that any one of these former clients had been solicited by Appellees, as required to establish a *prima facie* case. ***See*** Maj. Op. at 8-10. While it might have been unduly burdensome for Appellant to depose each of these individuals, Appellant could have conducted, and might well have done so, a less formal preliminary investigation to identify at least one current or former client who had been improperly encouraged by either of Appellees to leave Appellant to train with Appellees. However, Appellant failed to provide any indication to the trial court that it had done so, despite lengthy and thorough discovery.

This omission is especially troubling inasmuch as nothing in Pennsylvania law suggests that an individual preparing to depart one's employment is barred, absent contractual obligation, from informing clients of that departure and of the place where that individual intends to continue

doing business. As noted by the trial court, by the majority, and by prior Pennsylvania cases, there are certain client-oriented employments that tend to breed individual loyalty. ***See, e.g., Spring Steels, Inc., v. Molloy***, 162 A.2d 370, 375 (Pa. 1960) ("[I]t is inevitable . . . where [a] former employee has dealt with customers on a personal basis that some of those customers will want to continue to deal with him in his new association."); ***accord Renee Beauty Salons, Inc., v. Blose-Venable***, 652 A.2d 1345 (Pa. Super. 1995). Speaking generally, it is not the law's place to interfere with free commerce of this sort.

That being said, I confess a degree of sympathy for Appellant's objection to the trial court's stated basis for declining to impose sanctions against Appellees for spoliation of evidence. I find it difficult to understand how the trial court reached what I infer is its conclusion that no spoliation occurred. Appellant provides sufficient evidence to suggest that Appellees violated the trial court's preservation order of May 26, 2011, with regard to their "smartphones," their personal and/or business computer(s), as well as their internet-based e-mail accounts. Brief for Appellant at 31-32; Plaintiff's Supplemental Brief, Exh. A (citing Declaration of W. Scott Ardisson, certified forensic computer examiner, at 2-3, in which Ardisson avers that investigation revealed deletion of text messages not only from individual Appellees' smartphones, but also of computer back-ups of text messages up to the date they surrendered phones for examination); Brief in Support of Motion for Sanctions, 9/28/2011, Exh. D, Deposition of Anthony Piroli,

8/3/2011, at 25-26, 47-52 (Appellee Piroli attesting that, after surrendering files of his own selection on a portable electronic medium, he erased same files from computer despite knowledge of preservation order, and that he was unaware of any steps taken by him or Appellee Haley to guard against unintentional destruction, modification, or alteration of electronic documents or evidence, as specified by preservation order). The trial court acknowledged only Appellant's spoliation allegations as to the smartphones and the e-mail accounts:

> The record is clear that both individual [Appellees] routinely deleted text messages, often on a daily basis, so as not to unduly encumber their iPhones. Because of the volume of text messages that are frequently exchanged by cell phone users and the limited amount of storage on cell phones, it would be very difficult, if not impossible, to save all text messages and to continue to use the phone for messaging.

Trial Court Opinion ("T.C.O."), 7/31/2012, at 9 (footnote citing deposition testimony of Appellees omitted). The trial court simply is silent regarding Appellee Piroli's admission that, in violation of the import of that court's preservation order, he arranged for the "cleaning up" of his computer, a matter of considerably greater concern, in my opinion, than the deletion of text messages.

With regard to the remaining information, *i.e.*, that stored in Appellees' email accounts, the trial court found as follows:

> [Appellees] could not have destroyed any evidence related to the subject matter of the Amended Complaint. The record reflects that the alleged unlawful conduct or plan of [Appellees] as [pleaded] in the Amended Complaint was allegedly executed by

> [Appellees] while they were employed at PTSI. Therefore, the only potentially relevant information that would relate to the allegations of the individual [Appellees'] alleged misconduct would have been created while they were employed by PTSI. Since [Appellees'] employment with PTSI ended on April 29, 2011, any text messages or e-mails that were sent or received by them in furtherance of an alleged unlawful plan could not have occurred after that date. This Court's Order requiring the preservation of electronic evidence was not issued until May 26, 2011, about a month after the last of any "documentary and/or electronic evidence related to the subject matter of the Complaint" would have been created. The adverse spoliation inference need not have been drawn concerning e-mails and text messages that could not possibly be relevant to the claims at issue. Therefore, by the time [the trial court's] May 26, 2011 Preservation Order went into effect, the spoliation of any potentially relevant electronically stored information dated prior thereto had already occurred.

T.C.O. at 9-10.

The trial court's explanation appears necessarily to entail two questionable propositions: (1) that any post-May 26 act of spoliation could not have affected electronic files pre-dating Appellees' resignations from PTSI; and (2) that Appellees could not have created any files, or transmitted or received any e-mails or text messages, after their resignations from PTSI and the beginning of ESI's operations that would suggest that they had engaged in improper solicitation of PTSI clients. I believe that the inaccuracy of these propositions is self-evident. There is nothing in the record to suggest that Appellees' undisputed post-May 26 deletion of text messages, e-mails, and computer files affected only files created after their PTSI resignations; that only pre-resignation files could have any bearing upon Appellant's claims; or that such destruction could have concerned only

files with no bearing on the solicitation inquiry. Indeed, setting aside the text messages, the record suggests the contrary proposition: that Appellees deleted both computer files and e-mails pre-dating their resignations (unless it was Appellees' mutual practice to clean their computers of all data on a more or less monthly basis, a proposition as counterintuitive as it is unsupported by any evidence of record).[1]

The trial court also found that "substantially similar information was available from other [electronic discovery] custodians and other sources with less burden and difficulty." T.C.O. at 10. In support of this observation, the trial court noted that Appellant's forensic examiner "exhumed" and reviewed more than 1,000 e-mails from the computers he reviewed. ***Id.*** The trial court observed that Appellees' counsel "justifiably complained" that Appellant was engaging in a fishing expedition. While fishing expeditions certainly are disfavored, ***Land v. State Farm Mut. Ins. Co.***, 600 A.2d 605, 608 (Pa. 1991) (citing ***In re Thompson's Estate***, 206 A.2d 21 (Pa. 1965)), I cannot credit the trial court's observations regarding the relative burden

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[1] With regard to the deletion of text messages, in evaluating Appellant's motion for sanctions, the trial court was called upon to reconcile competing evidence, and we will not disturb the trial court's finding of fact absent a lack of substantial evidence or an abuse of discretion. ***Christian v. Penna. Fin'l Responsibility Assigned Claims Plan***, 686 A.2d 1, 5 (Pa. Super. 1996) (defining an abuse of discretion as "manifest unreasonableness, partiality, ill-will, or such lack of support as to be clearly erroneous"); ***see generally Cove Centre, Inc., v. Westhaver Constr., Inc.***, 965 A.2d 259 (Pa. Super. 2009) (requiring remand for trial court fact-finding to resolve allegations of discovery sanctions).

and difficulty involved in reviewing spoiliated evidence, had it been available to Appellant. At its own expense, Appellant "mirrored" the devices at issue, and Appellant's expert bore the burden of reviewing Appellees' internet-based e-mail accounts – again, at Appellant's expense. If Appellant was willing to shoulder the burden and expense, I fail to see how those aspects of discovery would militate against imposing a sanction for acts that interfered with such discovery.

Finally, the trial court minimized the relevance of Appellant's motion for sanctions to the larger case as follows:

> [E]ven if [Appellant] was entitled to a spoliation inference, that inference would not defeat [Appellees'] Motion for Summary Judgment. The evidence of record coupled with an adverse spoliation inference would not have been sufficient to create a genuine issue of material fact as to any of the . . . counts at issue. Electronically stored information is not at the center of importance to [the trial court's] adjudication. Considering all of the factors related to this case under a proportionality standard, [the trial court] properly decided that [Appellant] was not entitled to a spoliation inference or other discovery sanction.

T.C.O. at 11.

In light of the undeniable suggestiveness of Appellant's circumstantial evidence, had the trial court determined that an adverse inference was due, but granted summary judgment on the basis set forth above, I would be inclined to reverse. Unlike the trial court, I believe the spoliation admitted by Appellees might well have involved damning information predating Appellees' resignations from PTSI that, in turn, might have established an evidentiary basis upon which a jury could conclude that Appellees improperly

solicited Appellant's clients to move with them to ESI. Were a sufficient number of jurors to draw such an inference, upon a proper instruction, they might reasonably conclude based upon circumstantial evidence that Appellees were liable for one or more of the counts asserted.

However, when a party spoliates evidence in violation of a court order it lies in the trial court's discretion to determine the degree of fault and a proportionate sanction. ***Cove Centre***, 965 A.2d at 261. Thus, we could reverse the trial court's ruling on spoliation only if we find that the court has abused its discretion. ***See Christian***, *supra* n.1. While the trial court indicated its belief that a jury could not reasonably enter a verdict in favor of Appellant even given an adverse inference, a proposition with which I disagree, I read its other bases for denying that sanction to be independent of this debatable premise, and sufficient in their own right to demonstrate a sustainable exercise of the trial court's discretion. Specifically, as noted *supra*, Appellant's failure to present testimonial or other evidence militating in favor of the inference that Appellees improperly solicited Appellant's clients, despite lengthy discovery, suggests that its discovery efforts in this regard did amount to a fishing expedition.

Accordingly, I join the majority in finding that the trial court did not abuse its discretion in declining to impose a sanction for the spoliation of evidence at issue. ***See Cove Centre***, 965 A.2d at 263 (noting that deeming requested admissions to be admitted and entering judgment against the sanctioned party is the greatest available sanction, and reversing the trial

court's entry of same as an abuse of discretion). Absent an adverse inference instruction, or a punitive sanction to similar effect, the trial court's summary judgment ruling must be considered solely on the evidence proffered, which was developed after extensive discovery. For the foregoing reasons, and subject to the reservations expressed above, I find no error of law or abuse of discretion in the trial court's ruling granting Appellees' motion for summary judgment. Accordingly, I concur in the majority's opinion.