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Brooks Automation, Inc. v. **Blueshift** Technologies, Inc.

Mass.App.Ct., 2007.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.  
BROOKS AUTOMATION, INC.,

v.

**BLUESHIFT TECHNOLOGIES, INC., &**  
another.FN1

FN1. Peter van der Meulen.

**No. 06-P-1063.**

June 14, 2007.

*MEMORANDUM AND ORDER PURSUANT TO  
RULE 1:28*

\*1 *Facts.* This appeal represents the latest stage in a dispute between Brooks Automation, Inc. (Brooks), and its former employee, Peter van der Meulen, along with his company, **BlueShift** Technologies, Inc. (**BlueShift**). Van der Meulen worked for Brooks on and off between 1993 and 2003, when his employment was terminated. In addition to signing an agreement not to disclose trade secrets and confidential information, he signed an agreement not to compete with Brooks for one year, beginning May 30, 2003.

During his post-termination year, van der Meulen began to craft an invention based on a trade show presentation he observed. He attended business school and developed a plan for his own business as part of a school project. He then incorporated that business in name only, with no employees, funding, programming, or product. He also submitted a provisional patent application for his invention.

Van der Meulen's noncompetition agreement expired on June 1, 2004. In or about May of 2005, Brooks learned of van der Meulen's patent application. Subsequent to that discovery, Brooks learned that van der Meulen, through **BlueShift**, was at-

tempting to sell its manufacturing technology to Applied Materials, Inc. (Applied). Brooks sued van der Meulen and **Blueshift** in September, 2005, alleging breach of the nondisclosure agreement and breach of the separation agreement. Before serving or even informing van der Meulen or **BlueShift** of the suit, Brooks notified Applied by electronic mail (e-mail) of the pending "intellectual property" litigation between Brooks and van der Meulen/**BlueShift**. Applied responded to this e-mail, assuring Brooks that it would not "get in the middle" of such an action. Thereafter, Applied did not pay the remainder of a purchase order it had placed with **BlueShift**.

Brooks's claims went to trial on an expedited schedule, and the jury resolved them in favor of van der Meulen and **BlueShift**. Those judgments are not appealed here.

The claims on appeal arise from counterclaims filed by van der Meulen and **BlueShift** for tortious interference with business relations and unfair trade practices under G.L. c. 93A, § 11. In response to those counterclaims, Brooks filed a special motion to dismiss under G.L. c. 231, § 59H, popularly known as the anti-SLAPP statute. See *Duracraft Corp. v. Holmes Prod. Corp.*, 427 Mass. 156, 161 (1998). The trial judge decided, without objection, that the trial would function as an evidentiary hearing on the anti-SLAPP motion. The jury found for van der Meulen and **BlueShift** on the claim of intentional interference. The judge denied the special motion to dismiss, found that Brooks had violated G.L. c. 93A, § 11, and trebled the damages against Brooks.

On appeal, Brooks makes the following claims: (1) the trial judge erred in denying the special motion to dismiss; (2) the evidence was insufficient as matter of law to establish tortious interference; and (3) the trial judge erred in his rulings pursuant to G.L. c. 93A, § 11. We affirm.

\*2 *Discussion.* 1. *The special motion to dismiss.* We

review the judge's decision denying a special motion to dismiss for abuse of discretion or other error of law. See *The Cadle Co. v. Schlichtmann*, 448 Mass. 242, 250 (2007); *Kalter v. Wood*, 67 Mass.App.Ct. 584, 586 (2006). The judge found that Brooks's lawsuit—which formed the basis of van der Meulen and **BlueShift's** counterclaims—was petitioning activity under G.L. c. 231, § 59H. As such, the burden shifted to van der Meulen and **BlueShift** to show, by a preponderance of the evidence, that Brooks's petition was devoid of any reasonable factual support or any arguable basis in law, and that the petitioning caused them actual injury. See *Baker v. Parsons*, 434 Mass. 543, 553-554 (2001); *Office One, Inc. v. Lopez*, 437 Mass. 113, 123 (2002); *Adams v. Whitman*, 62 Mass.App.Ct. 850, 853 (2005). Generally, it is insufficient to show that the petitioning activity was based on an error of law; rather, the respondent must show that no reasonable person could conclude that there was a basis in law for requesting review. See *Baker v. Parsons*, *supra* at 555 n. 20.

Applying this standard, the judge found that at the time of filing, Brooks had neither factual nor legal support for the proposition that van der Meulen had breached his promise not to compete against Brooks for one year following the termination of his employment. As to the factual basis, the judge found that at the time of filing suit, Brooks had only one cryptic sentence in an e-mail from van der Meulen to a business school classmate to support its claim. At trial, and without contradiction, van der Meulen testified to an alternative explanation for the e-mail, which rendered it benign. As the judge stated, this e-mail was “too slender a reed” on which to base a claim.

As to the “basis in law” requirement, the judge found that no reasonable litigant could realistically have expected to succeed on the merits of Brooks's claim. See *Donovan v. Gardner*, 50 Mass.App.Ct. 595, 600 n. 10 (2000). At most, van der Meulen had prepared to compete with Brooks when his non-competition agreement expired. No case in our jurisdiction stands for the proposition that a current or former employee, even one subject to a noncompet-

ition agreement or a duty of loyalty, may not prepare to compete with his or her employer. See *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 172-173 (1991); *DeLong Corp. v. Lucas*, 278 F.2d 804, 808 (2d Cir.1960). Moreover, van der Meulen's non-competition agreement did not prohibit preparation, and none of van der Meulen's actions could be reasonably construed as directly or indirectly competing with Brooks. Van der Meulen had no product, no investors, no funding, no marketing, and no employees, and he was not working for another company. Given these facts, the trial judge did not abuse his discretion in finding that Brooks lacked a factual basis for its claims that van der Meulen competed against Brooks.

\*3 Similarly, we will not disturb the judge's conclusion that no legal basis existed for the claim that van der Meulen breached his nondisclosure agreement. All of the specific components of the technology in question were in the public domain, and the judge had ample support for his conclusion that van der Meulen's combination of such components materially differed from Brooks's technology.<sup>FN2</sup> Furthermore, such combination did not “require a great deal of ingenuity.” Add. 13. For these reasons, and those set forth in the trial judge's decision and the appellees' brief, the judge did not err in denying the special motion to dismiss.<sup>FN3</sup>

FN2. In addition, as the judge found, “Brooks never articulated with precision which trade secrets or confidential information had been stolen.” Add. 13.

FN3. We note, as did the Supreme Judicial Court in *Duracraft*, which like the instant case involved a suit alleging the breach of a noncompetition agreement, that there is “no evidence that the [anti-SLAPP] statute was intended to reach suits such as this one between two corporate competitors involved in other ongoing litigation, where the special motion may have been deployed not to limit ‘strategic litigation,’ but as an additional litigation tactic.” *Duracraft*, 427 Mass. at 163.

2. *Tortious interference.* Brooks claims that the jury had “no basis” to conclude that Brooks acted through improper means or that **BlueShift** suffered loss due to Brooks's conduct.<sup>FN4</sup> A jury verdict will be upheld as long as “anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.” *Tufankjian v. Rockland Trust Co.*, 57 Mass.App.Ct. 173, 178 n. 9 (2003), quoting from *Dobos v. Driscoll*, 404 Mass. 634, 656, cert. denied, 493 U.S. 850 (1989). Here, evidence at trial of the “improper means” and “loss” elements was more than sufficient. Specifically, the jury were justified in finding the following: Brooks contacted van der Meulen after hearing of his relationship with Applied; Brooks failed to negotiate in good faith toward a resolution of any concerns regarding competition; after filing suit against van der Meulen and **BlueShift**, Brooks failed to serve those parties; Brooks instead contacted Applied, warning it of an impending intellectual property violation lawsuit between Brooks and van der Meulen; and as a result of this communication, Applied withdrew from its deal with van der Meulen and **BlueShift**.<sup>FN5</sup> Contrary to counsel's suggestion at oral argument, the existence of alternative explanations for Applied's withdrawal does not render the jury's finding unsupported. “If any such combination of circumstances could be found it is ... immaterial how many other combinations could have been found which would have led to conclusions adverse to the plaintiff.” *Kelly v. Railway Exp. Agency, Inc.*, 315 Mass. 301, 302 (1943). We therefore decline to disturb the jury's finding of tortious interference.

FN4. “There are four elements required to establish interference with advantageous business relations: (1) the plaintiff has a business relationship for economic benefit with a third party, (2) the defendants knew of that relationship, (3) the defendants interfered with that relationship through improper motive or means, and (4) the plaintiff's loss of the advantage resulted directly from the defendants' conduct.” *Mc-*

*Namee v. Jenkins*, 52 Mass.App.Ct. 503, 508 (2001). To establish “improper motive or means,” one must give proof of a defendant's “actual malice,” or “spiteful, malignant purpose, unrelated to the legitimate corporate interest.” *Shea v. Emmanuel College*, 425 Mass. 761, 764 (1997), quoting from *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. 469, 476 (1992).

FN5. In response to Brooks's e-mail warning of the impending lawsuit, Applied stated, “Obviously we do not want to get in the middle of any action between you and **Blueshift**. We will always respect IP since it is so critical to us....” App. 4456.

3. *Unfair and deceptive trade practice.* Finally, we agree with the trial judge's rulings under G.L. c. 93A, § 11. As the judge noted, a c. 93A violation typically cannot arise from the filing of litigation alone. See *First Enterprises, Ltd. v. Cooper*, 425 Mass. 344, 347-348 (1997). Given that, the judge additionally considered Brooks's improper motive in filing its complaint. As the judge found, Brooks's suit was filed with reckless disregard as to whether there was any reasonable factual support for the allegations it contained, and motivated by the desire to interfere with **Blueshift's** developing contractual relationship with Applied. This, he properly concluded, constituted an unfair and deceptive trade practice. For this, and the other reasons stated by the judge, Brooks's actions constituted a wilful violation of c. 93A.

\*4 4. *Attorney's fees.* Van der Meulen and **BlueShift** did not request appellate attorney's fees, and we therefore decline to award such fees. See *Beal Bank, SSB v. Eurich*, 448 Mass. 9, 11-14 (2006). *Judgment affirmed.*

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