COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1563 **Cir. Ct. No. 2004AP411**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LEO'S SALONS, INC.,

PLAINTIFF-APPELLANT,

V.

DEONNE'S SALON AND DAY SPA, LLC, DEONNE WINNIE, JOANNE BLYSTONE, SABRINA BROWN, TARA DURRER, EMILY VILMAN, KRISTINE MANGIARACINA, COLLEEN MCGETTIGAN, MELANIE NEUMAIER, KATHERINE WIEBE, SHANA LIETZEN, MELISSA NUMMERDOR, BRIAN BOMAN, DEANNA FELDNER, AND KATRINA LORFELD,

DEFENDANTS,

SUSAN G. SHAFEL AND RICKI PITZNER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Leo's Salons, Inc. appeals an order of the circuit court dismissing two of the defendants from this case. The issues are whether the court properly granted Ricki Pitzner's motion to dismiss for lack of personal jurisdiction, and whether the court properly granted summary judgment dismissing defendant Susan Shafel after concluding there were no genuine issues of material fact or any evidence that Shafel misappropriated trade secrets. We conclude that the court had personal jurisdiction over Pitzner. We also conclude that Leo's Salons has provided no facts from which a reasonable inference could be drawn that Shafel misappropriated Leo's Salons' trade secrets. We therefore reverse the court's order dismissing Pitzner, and affirm its order dismissing Shafel.

BACKGROUND

¶2 We take the following facts from the complaint and summary judgment materials. Leo's Salons is a Wisconsin corporation which owns and operates seven beauty salons in the Madison area. Each of the salons owned by Leo's Salons keeps confidential client information,[1] obtained through cards filled out by customers on their first visit to the salon which contain the caption, "THIS CARD CONFIDENTIAL TO LEO'S SALON, INC." Some of the information gathered by these cards includes the name, address, and telephone numbers of each customer. Leo's Salons' employees are required to enter the customer information from the card into the salon's computer, which password-protects the

[1] Whether the information that Leo's Salons contends is confidential constitutes trade secret information is not at issue in this case. We therefore assume for purposes of this appeal that this information meets the legal definition of trade secrets.

information, and then to destroy the card. The employees also add other confidential information to the clients' files on occasion, including product purchases, visit frequency, and changes of address and telephone numbers. The client information is used to personalize customer service, and for marketing purposes including creation of mailing lists; distribution of promotional information, coupons and discount or sale information; appointment confirmations, cancellations and changes; and marketing decisions based on the information contained in the client information database.

¶3 Deonne Winnie was a salon manager at Leo's Salons for over seventeen years. Her job responsibilities included maintaining the confidential client information, which included ensuring that information from the client cards was entered into Leo's Salons' computer. Winnie requested that Leo's Salons' employees be allowed to store some of the client information in black books kept at their work stations, for the sake of convenience; Leo's Salons granted her request.

¶4 Winnie resigned from her employment with Leo's Salons on September 29, 2003, and opened her own salon, Deonne's Salon and Day Spa, LLC. Leo's Salons sued Winnie and fourteen other former Leo's Salons' employees who went to work for Deonne's Salon, including Susan Shafel. The complaint alleged misappropriation of trade secrets, misappropriation of business assets, conversion, injury to business in violation of WIS. STAT. § 134.01 (2003-04),[2] and unjust enrichment. In particular, Leo's Salons alleged that the

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

defendants conspired and agreed to steal Leo's Salons' confidential client information, and that they used that information to send invitations, promotional literature, business cards and coupons for Deonne's Salon to Leo's Salons' customers. Leo's Salons also alleged that the defendants stole its customers by transferring appointments from Leo's Salons to Deonne's Salon without Leo's Salons' knowledge or consent, and by scheduling customer appointments at Deonne's Salon instead of at Leo's Salons while they were still employed by the latter salon.

¶5 In an amended complaint, Leo's Salons added a claim against Ricki Pitzner, one of the owners of Deonne's Salon, for tortious interference with contract.

¶6 Deonne's Salon and the other defendants moved for summary judgment, seeking to dismiss a number of claims. The circuit court granted the motion, dismissing the WIS. STAT. § 134.01 and unjust enrichment claims and limited the misappropriation of business assets and conversion claims; but the court denied summary judgment on the misappropriation claim. This order was not appealed.

¶7 After Pitzner was joined in the action, she moved to dismiss the complaint against her for lack of personal jurisdiction. Specifically, she alleged that Leo's Salons failed to serve her with an authenticated summons and complaint. Susan Shafel also sought summary judgment, dismissing her from the case because Leo's Salons failed to produce any evidence from which a reasonable inference could be drawn that she misappropriated trade secrets within the meaning of WIS. STAT. § 134.90. The court granted Pitzner's motion and dismissed her from the case. The court also granted Shafel's motion and entered

summary judgment in her favor. Leo's Salons appeals the court's orders dismissing Pitzner and Shafel.

DISCUSSION

Dismissal of Pitzner for Lack of Personal Jurisdiction

¶8 We first address whether the circuit court properly granted Pitzner's motion to dismiss for lack of personal jurisdiction. Whether a court has personal jurisdiction is a question of law, which we review independently. ***Capitol Fixture & Woodworking Group v. Woodma Distribs., Inc***., 147 Wis. 2d 157, 160, 432 N.W.2d 647 (Ct. App. 1988).

¶9 Under the rules of civil procedure, a court obtains personal jurisdiction over a defendant by the service of an authenticated summons and complaint in a manner as required by statutes. ***Useni v. Boudron***, 2003 WI App 98, ¶¶8, 12-13, 264 Wis. 2d 783, 662 N.W.2d 672; *see* WIS. STAT. § 801.05.[3] A

[3] WISCONSIN STAT. § 801.05 states:

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:
>
> **(1)** LOCAL PRESENCE OR STATUS. In any action whether arising within or without this state, against a defendant who when the action is commenced:
>
> (a) Is a natural person present within this state when served; or
>
> (b) Is a natural person domiciled within this state; or
>
> (c) Is a domestic corporation or limited liability company; or

(continued)

defendant waives the defense of lack of personal jurisdiction if not raised in the answer, by motion before filing the answer, or if not made in a responsive pleading. WIS. STAT. § 802.06(2) and (8)(a).[4] Waiver may also occur where a defendant makes an appearance and seeks relief on matters aside from

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> (d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

[4] WISCONSIN STAT. § 802.06(2) states in pertinent part:

> (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> ….
>
> 3. Lack of jurisdiction over the person or property.
>
> ….
>
> (b) A motion making any of the defenses in par. (a) 1. to 10. shall be made before pleading if a further pleading is permitted. Objection to venue shall be made in accordance with s. 801.51. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief….

Section 802.06(8)(a) states:

> A defense of lack of jurisdiction over the person or the property, insufficiency of process, untimeliness or insufficiency of service of process or another action pending between the same parties for the same cause is waived only if any of the following conditions is met:
>
> 1. The defense is omitted from a motion in the circumstances described in sub. (7).
>
> 2. The defense is neither made by motion under this section nor included in a responsive pleading.

jurisdictional objections. ***Artis-Wergin v. Artis-Wergin***, 151 Wis. 2d 445, 452, 444 N.W.2d 750 (Ct. App. 1989).

¶10 As a preliminary matter, we must determine the applicable legal standard used to determine whether the circuit court obtained personal jurisdiction over Pitzner. Leo's Salons argues that the circuit court obtained personal jurisdiction over Pitzner in three ways: (1) Pitzner waived the defense of lack of personal jurisdiction; (2) the court "ordered" that Pitzner was deemed served; and (3) her attorney executed an admission of service. We address the first argument only.

¶11 Leo's Salons argues that, under ***Artis-Wergin***, Pitzner submitted to the court's personal jurisdiction when her attorney sought affirmative relief in the form of a postponement of the jury trial prior to objecting to the court's personal jurisdiction. In ***Artis-Wergin*** we said "[w]here an appearance is made and relief is sought on other matters, the lack of personal jurisdiction objection is waived." ***Id.*** at 452 (citation omitted). In ***Kildea v. Kildea***, 143 Wis. 2d 108, 113, 420 N.W.2d 391 (Ct. App. 1988), we explained:

> It is well settled in this court that if a litigant desires to avail himself of want of jurisdiction of his person he must keep out of court for all purposes except that of objecting to jurisdiction, or, what is the same thing, moving to dismiss on that ground. If he takes any step consistent with the idea that the court has jurisdiction of his person, such appearance amounts to a general appearance and gives the court jurisdiction for all purposes.

¶12 Pitzner argues, however, that ***Useni*** controls our determination of whether Pitzner waived a personal jurisdiction defense. There we concluded that "appearances in an action do not waive a personal jurisdiction defense." ***Useni***,

264 Wis. 2d 783, ¶12 (citing ***Honeycrest Farms, Inc. v. Brave Harvestore Sys., Inc.***, 200 Wis. 2d 256, 268, 546 N.W.2d 192 (Ct. App. 1996)).

¶13 The ***Useni*** holding Pitzner relies on is inconsistent with ***Kildea*** and ***Artis-Wergin***.[5] Both ***Kildea*** and ***Artis-Wergin*** were decided long before ***Useni***; therefore they control. *See* ***State v. Bolden***, 2003 WI App 155, ¶¶9-11, 265 Wis. 2d 853, 667 N.W.2d 364 (first of two published conflicting court of appeals opinions controls). Consequently, we follow the analysis and rulings of ***Kildea*** and ***Artis-Wergin*** and apply them to the facts presented in this case. Doing so, we conclude that Pitzner failed to preserve her personal jurisdiction objection.

¶14 In ***Artis-Wergin***, an attorney representing the respondent in a divorce action wrote the circuit court seeking a stay of the proceedings. ***Artis-Wergin***, 151 Wis. 2d at 448. The attorney did not reserve a jurisdictional objection in that letter. ***Id.*** In that case, we framed the issue before us as whether the letter "constituted an appearance as specified in sec. 801.06, resulting in a waiver of any jurisdictional objection." ***Id.*** at 452. We first considered WIS. STAT. § 801.06, which provides that a court having subject matter jurisdiction may exercise personal jurisdiction "over any person who appears in the action and waives the defense of lack of jurisdiction over his or her person as provided in s. 802.06(8)." ***Id.***, quoting WIS. STAT. § 801.06. We noted that a defendant waives a personal jurisdiction "only 1) if it is omitted from a motion [consolidating

[5] ***Useni v. Boudron***, 2003 WI App 98, 264 Wis. 2d 783, 662 N.W.2d 672, did not expressly overrule ***Kildea v. Kildea***, 143 Wis. 2d 108, 113, 420 N.W.2d 391 (Ct. App. 1988), or ***Artis-Wergin v. Artis-Wergin***, 151 Wis. 2d 445, 452, 444 N.W.2d 750 (Ct. App. 1989). Indeed, ***Useni*** made no mention of either case, nor did it address WIS. STAT. § 801.06.

defenses], or 2) if it is neither made by motion under this section nor included in a responsive pleading." ***Id.***, quoting WIS. STAT. § 802.06(8)(a).

¶15 We also explained in ***Artis-Wergin*** that "[t]he term 'appearance' is generally used to signify an overt act by which one against whom a suit has been commenced submits himself to the court's jurisdiction." ***Id.*** (citation omitted). We further explained that "an appearance of a defendant who does not object to the jurisdiction over his person is a general appearance and equivalent to personal service." ***Id.*** at 452-53. Applying this rule, we concluded that the attorney's letter to the trial court seeking a stay of proceedings resulted in a waiver of a personal jurisdictional objection, and that the waiver "served as an appearance and gave the court personal jurisdiction." ***Id.*** at 453.

¶16 We conclude that, based on the undisputed facts, Pitzner made an "appearance" before objecting to the court's personal jurisdiction, thereby waiving a defense of lack of personal jurisdiction. Similar to ***Artis-Wergin***, the court here held a telephonic status conference with the attorneys. At the status conference, Pitzner's attorney requested affirmative relief in the form of moving the trial date. Her attorney explained that a postponement of the trial was necessary because the court granted Leo Salons' motion to amend its pleadings, adding Pitzner as a party, and as a result counsel needed more time to conduct discovery. Pitzner does not dispute that she failed to raise a defense of lack of personal jurisdiction prior to or at the time of the status conference. The court granted Pitzner's request and rescheduled the trial. We see no material difference between the facts of this case and those presented in ***Artis-Wergin***. We conclude the court has personal jurisdiction over Pitzner.

Summary Judgment Dismissal of Susan Shafel

¶17 Leo's Salons argues that the circuit court erred in granting Shafel's motion for summary judgment because there are material facts in dispute regarding whether Shafel accessed Leo's Salons' trade secret information and used it at Deonne's Salon. We disagree.

¶18 Summary judgment is appropriate when there is no material factual dispute and a party is entitled to judgment as a matter of law. *See* ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶19 WISCONSIN STAT. § 134.90(2) sets forth the requirements for proving a misappropriation claim:

> MISAPPROPRIATION. No person, including the state, may misappropriate or threaten to misappropriate a trade secret by doing any of the following:
>
> (a) Acquiring the trade secret of another by means which the person *knows or has reason to know* constitute improper means.
>
> (b) Disclosing or using without express or implied consent a trade secret of another if the person did any of the following:
>
> 1. Used improper means to acquire knowledge of the trade secret.
>
> 2. At the time of disclosure or use, *knew or had reason to know* that he or she obtained knowledge of the trade secret through any of the following means:
>
> a. Deriving it from or through a person who utilized improper means to acquire it.

> b. Acquiring it under circumstances giving rise to a duty to maintain its secrecy or limit its use.
>
> c. Deriving it from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.
>
> d. Acquiring it by accident or mistake.

(Emphasis added.) Under the plain language of this statute, Leo's Salons must point to undisputed facts showing that Shafel knew or had reason to know that the information she acquired was obtained through improper means, or that she knew or had reason to know that the information she used was a trade secret acquired in a manner described by § 134.90(2)(b)2. We conclude Leo's Salons has not produced any admissible evidence that, if believed by a reasonable jury, would support a verdict in its favor against Susan Shafel.

¶20 Leo's Salons relies on several facts, and inferences which it claims reasonably arise from those facts, in support of its assertion that material facts remain in dispute regarding Shafel's role in the alleged misappropriation. It first points to testimony by Shafel that it construes as conceding that she entered appointments into two appointment books while working at Leo's Salons. Leo's Salons asserts that this evidence "implies that [Shafel] may have either copied information into the duplicate book for use at Deonne's, or that while still working at Leo's, she recorded appointments for customers at Deonne's." Shafel counters that this evidence fails to prove that she had the intent or knowledge as required by WIS. STAT. § 134.90 to use any trade secret information contained in the appointment books for Deonne's Salon's benefit. We agree with Shafel.

¶21 The fact that Shafel entered appointments into two appointment books while employed at Leo's Salons does not support a reasonable inference that she copied trade secret information for use at Deonne's Salon or that she

entered appointments for future clients of Deonne's Salon. As Shafel points out, she testified in disposition "that she never saw two books at Leo's, she never used two books at Leo's and she does not know why there were two books at Leo's." Leo's Salons presents no facts refuting this testimony. The only reasonable inference from this testimony is that Shafel may have entered appointments into two appointment books, unaware that another book existed. Leo's Salons points to no evidence indicating that Shafel copied any information from one book to another, such as an appointment entered in one book that also appears in the duplicate appointment book, in Shafel's handwriting.

¶22 Shafel also testified she was not aware that Winnie was leaving Leo's Salons to open her own salon until after Winnie left. This fact undercuts any inference that, even if Shafel was aware of the two appointment books, her entries into the books was intended to acquire trade secret information for Deonne's Salon. Leo's Salons asserts that Shafel continued to work at its salon after Winnie left and could have obtained the trade secrets in this manner in anticipation of working for Winnie. But Leo's Salons fails to support this speculation with any evidence indicating Shafel transferred information from one appointment book to the other during this time period.

¶23 Leo's Salons next relies on Shafel's testimony that after she left employment at Leo's Salons and prior to the opening of Deonne's Salon, she entered appointments, including names and phone numbers, into Deonne's Salon's computer system for Winnie and for other stylists. Leo's Salons argues that "[b]y assisting in transferring information on clients that were previous clients of Leo's, Shafel used Leo's trade secret information without Leo's consent by deriving the information from Winnie or the other stylists who utilized improper means to acquire it."

¶24 Leo's Salons asserts that Shafel was aware that the information she entered into Deonne's Salon's computer related to former clients of Leo's Salons. It also asserts that Shafel knew the information was improperly acquired and was being used for purposes prohibited by the misappropriation statute. Leo's Salons points to no evidence supporting these assertions beyond the bare fact that Shafel made data entries.

¶25 Leo's Salons argues that the "[d]efendants-respondents admitted in their Answer" that Leo's Salons customers were informed by letter or by telephone that their appointments had been transferred to Deonne's Salon. Leo's Salons also points out that Pitzner testified she assumed that customer information provided for entry into Deonne's Salon's computer system by the stylists was information about customers of Leo's Salons. From this evidence Leo's Salons infers that the information Shafel entered into Deonne's Salon's computer was trade secret information regarding former clients of Leo's Salons and that this information was given to Shafel by Winnie and the other stylists. We fail to see how this evidence demonstrates that Shafel knew or should have known that she had acquired trade secret information and that the information was to be used for improper purposes.

CONCLUSION

¶26 We conclude that Pitzner waived the defense of lack of personal jurisdiction by her appearance in this case prior to asserting the defense. We also conclude that Leo's Salons has failed to demonstrate the existence of a genuine issue of material fact that Shafel misappropriated trade secrets. We therefore reverse the circuit court's order granting Pitzner's motion to dismiss and affirm the court's order of summary judgment in Shafel's favor.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.