

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

FARMERS INSURANCE EXCHANGE et al.,

Plaintiffs and Respondents,

v.

DAVID SONG,

Defendant and Appellant.

A131132

(Alameda County
Super. Ct. No. RG10538023)

Defendant David Song appeals from a preliminary injunction in favor of plaintiffs Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company and Farmers New World Life Insurance Company (collectively Farmers) prohibiting Song from using Farmers' confidential policyholder information to solicit insurance business. Song contends the court abused its discretion because the contractual provision on which the injunction is based unlawfully restrains his ability to work as an insurance agent and because Farmers failed to demonstrate a credible threat of irreparable harm to justify the injunction. We shall affirm.

Factual and Procedural Background

In January 1987, shortly after becoming a Farmers insurance agent, Song signed Farmer's standard Agent Appointment Agreement (Agent Agreement). Section I of the Agent Agreement provides as follows: "The Agent acknowledges that all manuals, lists and records of any kind (including information pertaining to policyholders and expirations) are the confidential property of the companies and agrees they shall not be

used or divulged in any way detrimental to the companies and shall be returned to the companies upon termination of the Agency.”¹

In July 2009, Farmers terminated its agency relationship with Song. On September 23, 2010, Farmers filed the present action after Song repeatedly refused to comply with Farmers’ request to return all confidential client information as required by section I of the Agent Agreement. The complaint alleges causes of action for breach of contract, misappropriation of trade secrets, intentional interference with contractual relations, unfair competition and breach of fiduciary duty and seeks both damages and injunctive relief.

On November 15, 2010, Farmers moved for a preliminary injunction to enjoin Song from, among other things, “using or divulging Farmers’ trade secrets, including Farmers’ confidential policyholder information, for any purpose, including but not limited to soliciting insurance business.” In addition, Farmers sought an order directing Song “[t]o immediately transfer or surrender to Farmers all copies, however maintained, of Farmers’ trade secrets, including Farmers’ confidential policyholder information.”

On January 24, 2011, after hearing evidence and argument, the trial court issued a preliminary injunction. The injunction provides in relevant part: “It is hereby ordered that: [¶] (1) . . . Song . . . must, within ten (10) court days of being served with notice of entry of this order, transfer or surrender to Farmers . . . all copies (including originals), however maintained, of: [¶] (a) ‘Documents’ or other tangible things created while Song was a Farmers agent containing Farmers’ ‘trade secrets and confidential information,’ including ‘confidential policyholder information’ . . . and [¶] (b) Documents created after termination of Song’s [Agent Agreement] with Farmers on July 31, 2009, which contain Farmers’ trade secrets and confidential information, including confidential policyholder information . . . ; [¶] . . . (2) Song . . . [is] restrained and enjoined from engaging in or

¹ The Agent Agreement also prohibited Song from soliciting Farmers’ clients for a period of one year. This provision was no longer in effect when Farmers filed the present action and the preliminary injunction from which the appeal has been taken does not purport to enforce that provision.

performing, directly or indirectly, any and all of the following acts: [¶] (a) Using, divulging or destroying any and all materials described above that are subject to transfer or surrender to Farmers” The injunction defines Farmers’ “trade secrets and confidential information” to include “all manuals, lists and records of any kind, including but not limited to Farmers’ ‘confidential policyholder information.’ ” It defines Farmers’ “confidential policyholder information,” as “name, address, telephone number, social security number, policy expiration date, insured property, claims history, financial, and all other information concerning individuals or entities who were Farmers’ policyholders while Song was a Farmers agent.”² Song filed a timely notice of appeal.

Discussion

“A preliminary injunction is governed by the following principles: ‘ ‘In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction.’ ’ [Citations.] [¶] We apply the abuse of discretion standard of review in reviewing the lower court’s order granting the preliminary injunction. ‘ ‘The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court. [Citations.] . . . [¶] A trial court will be found to have abused its discretion only when it has ‘ ‘exceeded the bounds of reason or contravened the uncontradicted evidence.’ ’ [Citations.] Further, the burden rests with the party challenging the injunction to make a clear showing of an abuse of discretion.’ ’ ” (*ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1016.)

A. *The Likelihood of Prevailing*

The trial court found that “Farmers has sufficiently shown through the submission of admissible evidence that Song had violated and is violating the terms of the [Agent Agreement] . . . by failing and refusing to return Farmers’ confidential policyholder

² The preliminary injunction also contains other provisions that Song does not challenge on appeal.

information despite being asked to do so” and, therefore, that “Farmers has presented sufficient evidence to show that it is likely to prevail on at least its contract claim at trial.”

Song argues that Farmers cannot prevail on its contract claim because section I of the Agent Agreement is void and unenforceable under Business and Professions Code section 16600.³ Under Section 16600, “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void,” subject to statutory exceptions not relevant here.

As indicated above, the enforceability of the nonsolicitation provision contained in the Agent Agreement is not at issue. The preliminary injunction prohibits only the use or disclosure of Farmers’ confidential information. Although Song is correct that California courts have consistently “condem[ed]” agreements that place restraints on the pursuit of a business or profession (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945–946), “[a]n equally lengthy line of cases has consistently held former employees may not misappropriate the former employer’s trade secrets to unfairly compete with the former employer.” (*The Retirement Group v. Galante* (2009) 176 Cal.App.4th 1226, 1237). “Courts have repeatedly held a former employee may be barred from soliciting existing customers to redirect their business away from the former employer and to the employee’s new business *if the employee is utilizing trade secret information* to solicit those customers.” (*Ibid.; Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1519 [“While it has been legally recognized that a former employee may use general knowledge, skill, and experience acquired in his or her former employment in competition with a former employer, the former employee may not use confidential information or trade secrets in doing so.”]; see also *State Farm Mut. Auto. Ins. Co. v. Dempster* (1959) 174 Cal.App.2d 418, 425-426 [section 16600 “does not invalidate the protection of the trade secret or trust. Prohibition of a contract forbidding one from

³ All statutory references are to the Business and Professions Code unless otherwise noted.

engaging in business is not prohibition from solicitation of customers made known to him in confidence. The essence of the protected interest is the trade secret or trust.”].)

Contrary to Song’s argument, substantial evidence and significant case law support the court’s finding that the confidential policyholder information at issue is protected. In *State Farm Mut. Auto. Ins. Co. v. Dempster*, *supra*, 174 Cal.App.2d at page 422, the court upheld an injunction similar to the one issued in this case that prohibited the former insurance agent from soliciting policyholders using customer files that contained “ ‘the names, addresses and telephone numbers of policyholders, the amounts and types of insurance purchased . . . , due dates of premiums and the amounts thereof, the character, description and location of insured property, . . . and personal information as to the insured, such as age, birth date, physical condition, dependents, automobile drivers, driving records, financial and credit standing, and particularly the renewal and expiration dates of policies in force.’ ” The court found that “the very recital of the nature of the information acquired by the salesman and the unique interest of the company in the information, places it in the category of the trade secret” (*Id.* at p. 426; see also Civ. Code, § 3426.1, subd. (d) [defining a trade secret under the Uniform Trade Secrets Act (UTSA), Civil Code section 3426 et seq., as “information . . . that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”]; *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal.App.3d 622, 630-631 [Insurer’s customer list constitutes a trade secret under the UTSA]; *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1287 [the UTSA and case law “establish that a customer list procured by substantial time, effort, and expense is a protectable trade secret”].) Farmers submitted a declaration establishing that it “invested significant time, labor, and capital to developing its proprietary database of customer information” and that this information “gives Farmers commercial advantages over other insurers that would be lost if it were known to its competitors.” The declaration adds that this information is maintained on a password

protected system. This evidence is sufficient to support the trial court's finding for the purpose of granting the preliminary injunction that the confidential policyholder information at issue is likely to be found to be a trade secret under the UTSA.

Song's arguments to the contrary are not persuasive. *Edwards v. Arthur Andersen LLP*, *supra*, 44 Cal.4th 937 did not alter the long standing protection for trade secrets. In *Edwards*, the court rejected the argument that California should superimpose a nonstatutory, "narrow-restraint" exception to section 16600 to permit contractual agreements that bar one from pursuing only a small or limited part of his or her profession. However, the court expressly noted that it was not "address[ing] the applicability of the so-called trade secret exception to section 16600" because the employee was not disputing that portion of his agreement. (*Edwards*, at p. 946, fn. 4.)

In *The Retirement Group v. Galante*, *supra*, 176 Cal.App.4th at pages 1233-1238, the court analyzed the "tension" between the strong public policy embodied in section 16600 favoring free competition and an employer's ability to protect its trade secrets from misappropriation by its former employees. After examining *Edwards* in depth, the court concluded that "section 16600 bars a court from specifically enforcing (by way of injunctive relief) a *contractual* clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin *tortious* conduct (as violative of either the [UTSA] and/or the Unfair Competition Law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer. Viewed in this light, therefore, the conduct is enjoinable not because it falls within a judicially created 'exception' to section 16600's ban on contractual nonsolicitation clauses, but is instead enjoinable because it is wrongful independent of any contractual undertaking." (*The Retirement Group*, *supra*, at p. 1238; but see *Dowell v. Biosense Webster, Inc.* (2009) 179 Cal.App.4th 564, 577 ["Although we doubt [after *Edwards*] the continued viability of the common law trade secret exception to covenants not to compete, we need not resolve the issue here."].) In the present action, neither the

injunction, nor the contract provision on which it is based, prohibit Song from soliciting Farmers' customers. Instead, they prohibit him from using Farmers' confidential information to do so.

Contrary to Song's next assertion, the confidential policyholder information at issue in this case belongs to Farmers irrespective of the fact that Song was an independent contractor and not an employee. And there is no ambiguity in section I of the Agent Agreement insofar as it requires the "return" of all confidential property to Farmers. In *State Farm Mut. Auto. Ins. Co. v. Dempster*, *supra*, 174 Cal.App.2d at p. 424, the court rejected a very similar argument: "The Agents contend that the contract provides that only 'records' and 'supplies' 'furnished to the Agent by the Companies' shall 'remain the property of the Companies' and that this mandate does not apply to the business or information obtained by the Agents themselves. However, the equitable protection extends to confidential trade information 'whether prepared by the employer or by the employee.' [Citation.] The reference to the employment relationship does not exclude the confidential relationship between independent contractors."

Finally, Song exaggerates the scope of the injunction and its impact on his ability to practice his profession. Song argues that the injunction prevents "him from ever working with the customer base he alone created, a customer base that consists of his family and friends." He suggests that the injunction "prevents [him] from contacting any of his prior customers, friends, family neighbors, etc. who were his customers when he was a Farmers agent, because to do so would entail [his] use of what the injunction defines as Farmers' 'confidential policyholder information,' specifically the policyholder's 'name, address, [and] telephone number.'" Whatever the validity of the expired nonsolicitation provision, the portion of the injunction that Song challenges does not prohibit him from soliciting or working with any persons who are or were clients of Farmers, including his friends and family. The preliminary injunction prohibits him only from using confidential information to solicit those clients. Farmers acknowledges that the injunction does not prohibit him from utilizing other means to obtain contact

information.⁴ A former employee cannot be expected to “wipe clean” the slate of his memory. (*Moss, Adams & Co. v. Shilling* (1986) 179 Cal.App.3d 124, 129.) But while a former employee “may use general knowledge, skill and experience acquired in his or her former employment in competition with a former employer, the former employee may not use confidential information or trade secrets in doing so.” (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1519.)⁵ With respect Song’s argument that much of the information, such as names, addresses and phone numbers, is publicly available, Farmers appropriately observes, “If this information is so readily available . . . then the injunction will be of no moment to [Song].”

2. *Interim Harm*

A preliminary injunction is intended “to preserve the status quo pending a determination on the merits of the claim.” (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1418.) This remedy is generally permissible “[w]hen it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce . . . great or irreparable injury[] to a party,” (Code Civ. Proc., § 526, “pecuniary compensation would not afford adequate relief,” or “[w]here it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.” (Code Civ. Proc., § 526, subd. (a)(2), (4) & (5).) “An

⁴ At oral argument, counsel for Farmers explicitly confirmed that if Song obtains from an independent source, such as the telephone directory, contact information for a person or entity he recalls from his service as a Farmers agent is a policy holder and then solicits that person or entity on behalf of a competitor, he will not have violated the terms of the preliminary injunction. What he may not do is search out the name or contact information of that policy holder in documents prepared by him or by Farmers in connection with his service as a Farmers agent or in papers copied or prepared from any such documents.

⁵ Factual questions may arise as to whether the identification of potential clients or information concerning a client’s specific needs or insurance policies was obtained independently or by reference to materials that Song was bound not to use. (See, e.g., *Morlife, Inc. v. Perry*, *supra*, 56 Cal.App.4th at pp. 1523-1524; Olsen, Kline & Amantea, Cal. Bus. Law Deskbook (2011 ed.) § 30.11.) We cannot and need not pass upon the myriad of hypothetical situations that conceivably may arise in the future. Such questions can only be resolved in concrete situations, likely framed by a claim for damages or a citation for contempt.

evaluation of the relative harm to the parties upon the granting or denial of a preliminary injunction requires consideration of: ‘(1) the inadequacy of any other remedy; (2) the degree of irreparable injury the denial of the injunction will cause; (3) the necessity to preserve the status quo; [and] (4) the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause.’ ” (*Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 435.)

In this case, Farmers argues that Song’s improper solicitation has caused and will continue to cause significant financial harm. Farmers submitted the declaration of Song’s district manager who stated that following Song’s termination, he received reports of numerous incidents indicating that Song was continuing to use confidential information to solicit business from Farmers’ policyholders. He reported that the percentage of Song’s policies lost by Farmers following Song’s termination was “far in excess of the expected attrition rate” and opined that in his experience “such an excessive loss of policies is due to Song’s solicitation efforts.”⁶ Farmers also argues that Song’s conduct, if not enjoined, will cause irreparable damage to their client relationships and good will. While the value of individual lost policies may be calculated for the purpose of determining damages, the total loss to Farmers resulting from the proscribed use of Farmers’ trade secrets is fraught with uncertainty as to such matters as causation and the length of time that a lost client would have continued to purchase insurance from Farmers. While the potential harm to Farmers is apparent if the use of its trade secrets is not immediately curbed, the potential harm to Song if Farmers fails to prevail is minimal, because Song has not been prevented from conducting his business using information obtained independently. Accordingly, the court did not abuse its discretion in issuing the preliminary injunction.

⁶ Although defendant filed evidentiary objections to all of Farmer’s evidence, including this declaration, Song did not secure any rulings on his objections nor does he argue on appeal that the declaration is inadmissible.

Disposition

The preliminary injunction is affirmed. Farmers shall recover their costs on appeal.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.