

WACHOVIA INS. SERVS. v. MCGUIRT

06-CVS-13593

SUPERIOR COURT OF NORTH CAROLINA, MECKLENBURG COUNTY

August 30, 2006

Reporter

2006 NC Sup. Ct. Motions LEXIS 74 *

WACHOVIA INSURANCE SERVICES INC., f/k/a
CAMERON M. HARRIS & CO., Plaintiff, v. JOHN
JACKSON MCGUIRT, JR., and EDWARDS, CHURCH
AND MUSE, INC., Defendants.

Type: Motion

Counsel

[*1] William L. Rikard, Jr., Deborah L. Edney,
Attorneys for the Plaintiff Wachovia Insurance Services.

PARKER, POE, ADAMS & BERNSTEIN L.L.P., Three
First Union Center, Charlotte, NC, OF COUNSEL.

Title

MEMORANDUM IN SUPPORT OF MOTION FOR EXPEDITED DISCOVERY AND OPPOSING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

Text

Plaintiff Wachovia Insurance Services, Inc. f/k/a
Cameron M. Harris & Co. ("WIS" or "Plaintiff"), hereby
respectfully submits this Memorandum in support of its
motion for expedited discovery and in opposition to
defendants' John Jackson McGuirt, Jr. and Edwards,
Church and Muse, Inc.'s ("Defendants") motion for a
protective order. Defendants' motion is simply an effort
to impose delay and difficulty in this lawsuit and is not
propounded to protect either Defendant from any
unreasonable annoyance, oppression, embarrassment or
undue burden or expense. For these reasons, and as set
out below, Plaintiff's Motion for Expedited Discovery
should be granted and Defendants' motion should be
denied.

1. On July 14, 2006, WIS filed a Complaint and Motion

for Preliminary Injunction against Defendants. The
Complaint alleges, *inter alia*, that Defendants have
misappropriated, [*2] and threatened to misappropriate,
WIS's trade secrets, that McGuirt is breaching a covenant
not to compete, that McGuirt and ECM have tortiously
interfered with contracts of WIS and with the prospective
advantages of WIS, and that McGuirt and ECM have
committed unfair and deceptive trade practices in
violation of N.C. Gen. Stat. § 75-1.1.

2. Concurrently with the Complaint and Summons WIS
served and filed a Motion for Expedited Discovery and a
copy of the discovery (to wit, document requests to both
defendants), along with Notices for the Depositions of
ECM pursuant to Rule 30(b)(6), Mr. McGuirt and Melanie
Somers, a former WIS employee solicited by Mr. McGuirt.
McGuirt accepted service of the complaint and other
documents on July 14, 2006 and ECM was served on July
17, 2006. The Notices were served properly and the dates
for the depositions were scheduled 30 days after service of
the summons and complaint pursuant to Rule 30(a).

3. The document requests, of which Defendants were
aware from the outset, sought from Defendants
documents concerning the negotiations and
communications between ECM and McGuirt, McGuirt's
contacts with WIS clients and employees, [*3] and the
use/retention of WIS documents by ECM and McGuirt.
All of the information sought relates, *inter alia*, to the trade
secret misappropriation and tortious interference claims -
as well as the breach of contract claim.

4. In the July 14, 2006 letter provided with the summons,
complaint and discovery to Mr. McGuirt's attorneys and
to Arnold Edwards the president of ECM (along with a
courtesy copy of the complaint, summons and discovery),
Plaintiff's attorneys requested that Defendants' consent to
the expedited discovery without the need for a hearing,
stating "We would like to discuss the discovery with you
to see if we can agree upon mutually acceptable dates for
the responses and depositions. We will work with you

about dates, but want these requests on the record. If we cannot agree on a date for the written discovery, we will notice the first available hearing date on our motion." WIS agreed to delay scheduling a hearing during the period Defendants said they needed to evaluate their response.

5. On August 3, 2006, the parties made a Joint Motion for Recommendation for Designation of this Case as Exceptional under Rule 2.1. On August 11, 2006, WIS, continuing to be concerned [*4] about the ongoing activities of Defendants with respect to WIS customers, had its counsel send a letter to The Honorable Robert P. Johnston requesting as " prompt action as possible on the motion for 2.1 designation" so that a hearing could be scheduled. To the extent designation might be delayed, Plaintiff' s counsel requested that Judge Johnston, or Judge Diaz, hear the motions in advance of Rule 2.1 designation. Plaintiff has consistently attempted to protect itself in as efficient and effective a manner as possible, making every attempt to avoid additional burdens on the Defendants and the court, not create them.

6. Twenty-five days after being asked to consent to a mutually acceptable date for the production of the requested discovery and only a week before the scheduled depositions, Defendants filed their Motion for a Protective Order to prevent the depositions, and an opposition to the Motion for Expedited Discovery. As a basis for their Motion and opposition, Defendants cite the 12(b)(6) Motions to Dismiss they filed contemporaneously with the filing of the instant Motion and opposition. Defendants' argue in their Motions to Dismiss that two of WIS' claims should be dismissed [*5] because they contend the employment agreement at issue is unenforceable. WIS strongly disagrees with Defendants' positions, as is more fully discussed in WIS' opposition to the Motions to Dismiss. The outcome of those motions is, however, immaterial to the propriety of the discovery WIS has requested and Defendants have used these motions to stall WIS' investigation into Mr. McGuirt and ECM' s bad acts which Plaintiff believes are, among other things, irreparably injuring its relationships with its customers on a continuing, daily basis.

7. As Defendants' correctly note in their Response and Motion for Protective Order ("Response") the complaint at issue contains thirteen (13) causes of action. Importantly, however, Defendants' are incorrect in claiming that the claims are " largely based on [the] contention that McGuirt is subject to an employment

agreement." (Response at P2). In fact, only two of the claims relate in any way to the employment agreement: the first, a breach of contract action against McGuirt, and the tenth, a tortious interference with contract claim against ECM. Each of the remaining claims relates to actions of ECM and McGuirt, including downloading and [*6] misappropriating, only days before his resignation, thousands upon thousands of WIS documents containing detailed and valuable confidential and trade secret business information of WIS. Other claims relate to the interference by McGuirt and ECM with valuable ongoing contracts and prospective contracts between WIS and its clients and employees without justification, and for sole purpose of harming WIS.

7. As discussed more fully in the Memorandum of Law in Opposition to Defendants' Motions to Dismiss, which is served concurrently with this Memorandum, WIS does not believe that Defendants will succeed on their Motions to Dismiss. Even success on those Motions, however, would not warrant the relief Defendants request here.

8. Defendants seek a Protective Order under N.C.R. Civ. Pro. 26(c) to prevent WIS from moving forward with its depositions until the Court rules on the Defendants' Motions to Dismiss. Defendants fail to acknowledge that the depositions were properly noticed under Rule 30(a) of the North Carolina Rules of Civil Procedure which states, in pertinent part that, " any party may take the testimony of any person . . . by deposition Leave of court . . . must be obtained [*7] only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint." N.C.R. Civ. Pro. 30(a). The depositions were noticed more than 30 days after McGuirt was served and ECM was given notice on July 14, 2006 and ECM was served on July 17, 2006. In addition, Plaintiff told Defendants at the time of service that it would work with them to schedule the discovery at a convenient time. Defendants' motion is tantamount to seeking a protective order for a regularly noticed deposition because it will be burdensome and expensive to prepare for and conduct. This is an improper basis for a protective order and Defendants' motion should be denied.

9. A protective order is intended to protect a party from unreasonable burden. See, e.g., *Williams v. State Farm Mutual Automobile Insurance Co.*, 67 N.C. App. 271, 312 S.E.2d 905 (1984)(authority to issue protective order is not unlimited, but must be only for good cause shown and

only to protect a party from unreasonable annoyance, embarrassment, oppression or undue burden or expense.) There is nothing unreasonable, annoying, embarrassing or oppressive about WIS' [*8] attempt to determine the extent of the actions McGuirt and ECM have taken to misappropriate WIS' confidential and trade secret information and use it unfairly in competition with WIS. All depositions could be said to be burdensome and expensive, but that is simply not a valid reason for a protective order to issue to prevent the depositions.

10. Plaintiff intends to pursue expedited discovery because it wants to bring on a motion for a preliminary injunction. McGuirt continues to call on Plaintiff's clients using knowledge gained from the proprietary information he misappropriated. Defendants appear to have made the motion for the protective order to delay WIS' attempt to protect its business and information from the actions undertaken by McGuirt and ECM. They should not be allowed to continue to prevent the discovery of this information and their motion should be denied.

11. Defendants also purport to oppose WIS' Motion for Expedited Discovery on the basis that the issues in this lawsuit "will be substantially narrowed or even eliminated" as to one or both of the Defendants, and WIS' grounds for a preliminary injunction will be eliminated, after the court decides the Motions to [*9] Dismiss. As is clear in Defendants' own submissions, and discussed more fully in the submissions related to the Motions to Dismiss, the Defendants' motions, even if successful, will not narrow or eliminate the need for discovery or for a preliminary injunction. Each of the requests made in WIS' expedited discovery relates to the misappropriation of trade secrets and tortious interference and there are, beyond the employment agreement, valid reasons for issuing injunctive relief.

12. McGuirt and ECM have been using the thousands of documents misappropriated from WIS to contact and solicit WIS clients and customers and induce them to switch to ECM. Without the information McGuirt took on the CD-ROM, before leaving WIS, they would not have been able to solicit and transfer the clients that they have already taken, and those actions are subject to injunctive relief regardless of the enforceability of the employment agreement. As the North Carolina Trade Secret Protection Act specifically states: " actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the . . ."

N.C. Gen. Stat. § 66-154. WIS is entitled to [*10] expedited discovery to determine the extent of McGuirt and ECM's actions and what other information they might have misappropriated and used.

13. Additionally, Defendants' complaint regarding the "burden" of producing discovery in 20-days is moot at this point. As of the date of the service of this Memorandum it has been 46-days since the service of the complaint on McGuirt and notice to ECM - the time in which they would have been required to produce discovery without a court order. See N.C.R. Civ. Pro. 34 (b).

14. More importantly, on August 8, 2006, out of an abundance of caution, Plaintiff re-served the Requests for Production of Documents initially served in July on both Defendants. Therefore, by September 8, 2006, the date currently scheduled for the hearing on this matter, 31 days will have passed from the second date of service and Defendants' responses will be one day overdue thereby obviating any need for Plaintiff's Motion for Expedited Discovery. To the extent Defendants seek an extension of time to respond to the discovery served on August 8, 2006, Plaintiff objects to such an extension and would request that the Court simply order the Defendants to comply with [*11] Rule 34 without additional delay or extension making the Motion for Expedited Discovery unnecessary.

15. As of September 8, 2006, both Defendants will have had notice of Plaintiff's document requests for 56 days. Defendants have had more than sufficient time to prepare and produce discovery particularly if, as Defendants "steadfastly" assert, the claims and allegations against them are not accurate. To the extent the Defendants are granted any sort of extension beyond September 7, 2006, the current due date for the discovery responses, WIS requests that the Court grant its motion for expedited discovery and require Defendants to respond to the discovery by no later than September 11, 2006.

WHEREFORE, Plaintiff prays the Court to:

- (1) deny Defendants' motion for a protective order;
- (2) grant Plaintiff's Motion for Expedited Discovery and require that Defendants' respond to the outstanding discovery by September 11, 2006;
- (3) require Defendants to produce McGuirt and ECM for depositions limited to their actions regarding the

misappropriation of trade secrets, breach of contract and the interference with clients and employees of WIS, without prejudice to WIS' right to take additional [*12] general depositions of McGuirt and ECM in the future; and

(4) grant such other and further relief as deemed necessary by the Court.

This 30th day of August, 2006.

/s/ Deborah L. Edney

William L. Rikard, Jr.

Deborah L. Edney

Attorneys for the Plaintiff Wachovia Insurance Services

/s/ Deborah L. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing *Plaintiff's Memorandum in Opposition to Defendants' Motions to Dismiss* have been served on the individual(s) listed below by facsimile and addressed as follows:

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Attorney for Defendant John J. McGuirt This the 30th day of August, 2006.

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