

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 01-1706

SPA TIME INC.,

Appellant

v.

BALLY TOTAL FITNESS CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW JERSEY

(Dist. Court No. 00-cv-03369)  
District Court Judge: Dennis M. Cavanaugh

Submitted Under Third Circuit LAR 34.1(a)  
January 17, 2002

Before: ALITO, ROTH, Circuit Judges, and SCHWARZER, Senior District Judge.

(Opinion Filed: February 1, 2002 )

MEMORANDUM OPINION OF THE COURT

PER CURIAM:

Spa Time, Inc. ("Spa") appeals from the District Court's grant of Bally Total Fitness Corporation's ("Bally's") Rule 12(b)(6) motion to dismiss for failure to state a claim and from the District Court's subsequent partial denial of Spa's motion for reconsideration and grant of Bally's converted motion for summary judgment. As the parties are well aware of the history of these proceedings and the facts involved, we need not repeat them here.

Spa raises two issues on appeal. First, Spa argues that Appellee Bally breached a trade secret covenant by entering into an agreement with Musak Corporation ("Musak") to broadcast in Bally's clubs. Second, Spa claims that Bally committed breach of a perpetual contract by entering into a new contract with Musak.

We exercise plenary review over a district court's dismissal of a complaint pursuant to Rule 12(b)(6), see *Maio v. Aetna Inc.*, 221 F.3d 472, 481 (3d Cir. 2000), and over a district court's grant of summary judgment, see *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000). In both cases, we apply the same test as the district court.

First, Appellant Spa asserts that the District Court erroneously applied the legal criteria for the tort of misappropriation of trade secrets because Spa was arguing a

contract claim for breach of a trade secret covenant. Appellant relies heavily on Consolidated Boiler Corp. v. Bogue Electric Co., 58 A.2d 759, 141 N.J. Eq. 550 (N.J. Ch. 1948), Bolt Associates v. Alpine Geophysical Associates, Inc., 365 F.2d 742 (3d Cir. 1966), and Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), argue that disclosure is not a required element of a breach of trade secret covenant claim. Spa claims that misuse is sufficient for breach of a trade secret covenant and that Bally improperly misused Spa's trade secret when it contracted with Muzak to provide music and advertising broadcasting services.

We need not reach Spa's analysis of Consolidated, Bolt, and Kewanee, and its legal conclusion that a trade secret covenant may be breached by either disclosure or misuse, because Spa fails to allege sufficient facts for either disclosure or misuse. Spa does not claim that Bally disclosed its trade secrets, and the only allegation of misuse is that Bally switched to Muzak to provide its music and advertisement broadcasting services. Yet if the trade secret at issue is merely the physical machinery and technical design of the system itself and its operation, which is what the facts indicate, then there is no allegation that either Bally or Musak used Spa's trade secret in any manner. Bally and Musak could have misused Spa's secret only if we interpret the trade secret to encompass the very idea of broadcasting music and advertising in health clubs. This interpretation of the trade secret, however, is not supported by the record. Although the parties stipulated to treat the system and its operation as a trade secret, they did not agree to treat the concept of a music broadcasting system in a health club as a trade secret. Therefore, even if Spa is legally correct that it does not have to show disclosure and that misuse of a trade secret is sufficient to prove breach of covenant, the District Court properly dismissed the case. Moreover, although the District Court emphasized that Spa had not alleged disclosure, it did also observe that Spa had failed to allege misuse. See Distr. Ct. Op. (Nov. 14, 2000) at 11, in App. at 11a ("Additionally, Spa has not alleged any facts showing that secret information was used by Musak or Bally to the detriment of Spa.").

Second, Spa claims that it entered into a contract of perpetual duration with Bally and that Bally breached this contract by later entering into an agreement with Muzak. Our review of the record leads us to conclude that the District Court correctly determined that the parties did not enter into a contract of perpetual duration. The record indicates clearly that the parties expected to enter into a national agreement at a future date, which evidenced an awareness of the limited nature of the parties' continued relationship and belied any intention for an intermediate agreement to be perpetual. The documents reviewed on rehearing also indicated a clear intent that the new agreement would be temporary. Therefore, we agree with the District Court's reasoning, especially in light of the disfavor of perpetual contracts shown by New Jersey courts.

In conclusion, the District Court properly found that Appellant Spa failed to make a prima facie case for breach of a trade secret covenant and to demonstrate the existence of a perpetual contract. Accordingly, the District Court's grants of Bally's motion to dismiss and its converted motion for summary judgment are affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

Circuit Judge