

AFFIRMED; Opinion Filed January 10, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00670-CV

**BM MEDICAL MANAGEMENT SERVICE, LLC, Appellant
V.
MICHAEL TURNER, Appellee**

**On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-04199-J**

MEMORANDUM OPINION

Before Justices Myers, Evans, and Richter¹
Opinion by Justice Myers

BM Medical Management Service, LLC appeals the trial court's denial of BM's application for a temporary injunction against Michael Turner. In one issue on appeal, BM Medical contends the trial court erred by denying the temporary injunction because BM Medical proved it had a cause of action against Turner, a probable right to the relief sought, and a probable, imminent, and irreparable injury. We affirm the trial court's order denying the temporary injunction.

BACKGROUND

BM Medical provides diagnostic laboratory testing for physicians. On October 1, 2014, BM Medical hired Turner as a business development manager for the company. Turner's job

¹ The Hon. Martin Richter, Justice, Assigned

was to sell the company's testing services to physicians. Turner signed an employment agreement containing a noncompetition provision and provisions for protection of BM Medical's confidential information. The noncompetition provision prohibited Turner for one year following his termination from being employed by a competing business, soliciting BM Medical's clients with whom he worked or had contact as an employee, and from recruiting or hiring BM Medical's employees during that period. The agreement also prohibited Turner from disclosing BM Medical's confidential information and required him to deliver to BM Medical at the termination of his employment all papers or data relevant to BM Medical's confidential information.

Before being hired by BM Medical, Turner's previous professional business had been in the oil and gas industry. In that business, he often worked with physicians who were investors in the oil and gas projects. Turner had been friends with Parham Berari, a medical distributor, for about a year before he went to work for BM Medical.

When Turner started working for BM Medical, he was given a user name and password to access the company's online portal. Turner used the online portal for his own client list and to submit his commission numbers. BM Medical's witnesses testified that the portal also contained the company's complete customer list (more than 1600 customers), physician information including the types and frequency of tests ordered by each doctor, and patients' test results. The portal also contained the customer contracts and the pricing information for the company's services. The company's witnesses testified that Turner's access to the portal gave him access to this confidential information. Turner testified that he was not given any training on how to use the portal. Turner testified he did not have access to the client list or to the database about the clients and that none of the information he saw on the portal provided him any advantage in

selling the company's products. Turner stated he was "not a very tech savvy guy" and was hardly ever on the portal.²

On an evening in February 2016, the CEO called Turner at his home and told him he was terminated. Turner's termination became effective March 17, 2016. Turner had the company's laptop computer with him, and he did not immediately return it. Turner went to work for a competing laboratory testing company, Gulfstream, in early March, 2016.

BM Medical filed suit against Turner on April 1, 2016 for breach of contract, tortious interference with contracts and prospective business relations, unfair competition through misappropriation, and unjust enrichment. BM Medical also applied for an injunction prohibiting Turner from disclosing or using BM Medical's confidential information, retaining BM Medical's materials, soliciting BM Medical's clients, recruiting, hiring, or communicating with BM Medical's employees, destroying any documents or data relevant to this case, defaming BM Medical or its employees, or violating the nondisclosure and noncompetition provisions of Turner's employment agreement with BM Medical.

On April 14, 2016, the trial court entered a temporary restraining order against Turner that prohibited Turner from disclosing or using BM Medical's confidential information, soliciting its clients, and recruiting its employees. The order also prohibited Turner from retaining any property or materials of BM Medical.

On April 29, 2016, Turner took the laptop computer issued to him by BM Medical to the Apple Store to get his personal photographs removed from the computer. The store's employee downloaded the pictures from the computer onto a flash drive for Turner. Turner then returned

² Turner testified as the first witness that the "portal" was his means of access and contained the data; he stated that to his knowledge he never accessed BM Medical's Laboratory Information System (LIS). BM Medical's witnesses, who testified later in the temporary injunction hearing, presented evidence that the portal was the means to access BM Medical's LIS and that when Turner testified about data in the portal he was actually referring to data contained in the LIS. BM Medical's witnesses, however, used "portal" and "LIS" interchangeably. We, therefore, use the term "portal" consistently with all the witnesses to refer to the means of accessing data and the system containing the data itself.

the computer to BM Medical. Turner testified that the only times he had used the computer since his termination were when he accessed his girlfriend's résumé and his employment agreement and when he took the computer to the Apple Store. He testified that the flash drive contained no information from the computer other than his personal photographs. He also testified that he had no documents or electronic files related to BM Medical's business. After he returned the computer, BM Medical had the computer forensically examined. Both sides referred to a forensic examiner's report regarding the computer, but the report is not in the record and neither side used it at the hearing.

On May 16, 2016, the trial court held a hearing on BM Medical's application for a temporary injunction. Turner and two witnesses for BM Medical testified at the hearing. At the conclusion of the hearing, the trial court denied the application for temporary injunction.

TEMPORARY INJUNCTION

In its issue on appeal, BM Medical contends the trial court erred by denying the application for a temporary injunction. BM Medical asks that we reverse the trial court's order and enter an injunction against Turner prohibiting him from (1) using or disclosing BM Medical's confidential information and (2) contacting or soliciting any clients, customers, affiliates, business prospects, suppliers, or vendors with whom Turner worked or had contact while employed by BM Medical for a period of one year from his termination.³

The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). *Id.* A temporary injunction is an extraordinary remedy and does not issue as a matter of right. An applicant for temporary injunction must plead and prove (1) a cause of action

³ Although Turner was employed by a competing company, BM Medical does not appear to seek to enforce the agreement's prohibition on him going to work for a competing company.

against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. *Id.* An injury is irreparable if the injured party cannot be compensated adequately in damages or if the damages cannot be measured by any certain pecuniary standard. *Id.* To demonstrate probable injury or harm, an applicant must show an injury for which there can be no real legal measure of damages or none that can be determined with a sufficient degree of certainty. *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 925–26 (Tex. App.—Dallas 2006, no pet.). At a temporary injunction hearing, the trial court considers whether the applicant has shown a probability of success and irreparable injury. *Id.* at 922.

We review a trial court’s order granting or denying a request for a temporary injunction under an abuse of discretion standard. *Butmaru*, 84 S.W.3d at 204. The reviewing court must not substitute its judgment for the trial court’s unless the trial court’s action was so arbitrary that it exceeded the bounds of reasonable discretion. *Id.* In reviewing the trial court’s decision, we draw all legitimate inferences from the evidence in the light most favorable to the trial court’s judgment. *Mkt. Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 916 (Tex. App.—Dallas 2006, no pet.). The trial court does not abuse its discretion by making a decision based on conflicting evidence. *Id.* However, the trial court does abuse its discretion when it misapplies the law to established facts or when the evidence does not reasonably support the trial court’s determination of the existence of probable injury or probable right of recovery. *Id.* We review *de novo* any determinations on questions of law that the trial court made in support of the order. *Id.*

BM Medical argues it suffered irreparable harm because Turner communicated with BM Medical’s clients after his termination, Turner had access to BM Medical’s confidential information, such as BM Medical’s client lists, pricing information, marketing information, the

online portal, and patient test results. BM Medical asserts that Turner would have a competitive advantage by using the information he acquired from BM Medical and have the ability to undersell the company. BM Medical states, “The evidence in the record established that [Turner] possesses confidential information of [BM Medical] and directly competes with [BM Medical]. . . . [T]he record is crystal clear that [Turner] has and intends to continue to use [BM Medical’s] confidential information for his benefit and to the detriment of [BM Medical].” We disagree.

After his termination, Turner did not have access to any confidential information except for the contents of the laptop computer. Turner testified that he did not access the computer following his termination except to examine his girlfriend’s resume and his employment agreement and when he took it to the Apple Store to have his personal photographs removed from the computer. The store employee loaded the photographs onto a flash drive for Turner. BM Medical had a forensic examination of the computer performed, and it presented no evidence that Turner’s testimony was false. Turner testified that he does not possess any papers or electronic files relating to BM Medical’s business.

Turner also testified that when he went to work for Gulfstream, he did not contact any of BM Medical’s clients with whom he had worked while employed by BM Medical. He testified that some of them contacted him to find out what had happened to him. Only one client of BM Medical became a client of Gulfstream, and that was Parham Berari, a good friend of Turner’s whom Turner had known before he went to work for BM Medical. Turner testified that although Berari was a customer of Gulfstream, he was still a customer of BM Medical. BM Medical presented no evidence that it had lost any of Berari’s business.

Based on the testimony at the temporary injunction hearing, we conclude the trial court could have found that BM Medical failed to show a probable, imminent, and irreparable injury

because it failed to prove Turner possessed, used, or disclosed any confidential information and it failed to prove Turner was soliciting its clients. Accordingly, the record does not show the trial court abused its discretion by denying BM Medical's application for a temporary injunction. We overrule BM Medical's issue on appeal.

CONCLUSION

We affirm the trial court's order denying BM Medical's application for a temporary injunction.

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/Lana Myers/

LANA MYERS
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BM MEDICAL MANAGEMENT
SERVICE, LLC, Appellant

No. 05-16-00670-CV V.

MICHAEL TURNER, Appellee

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Opinion delivered by Justice Myers. Justices
Evans and Richter participating.

In accordance with this Court's opinion of this date, the order of the trial court denying appellant BM MEDICAL MANAGEMENT SERVICE, LLC.'s application for a temporary injunction is **AFFIRMED**.

It is **ORDERED** that appellee MICHAEL TURNER recover his costs of this appeal from appellant BM MEDICAL MANAGEMENT SERVICE, LLC.

Judgment entered this 10th day of January, 2017.