

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1340-13T2

GATEWAY CARE CENTER and THE
PALACE REHABILITATION AND
CARE CENTER,

Plaintiffs-Appellants,

v.

JOHN SUNG,

Defendant-Respondent,

and

MISOOK LEE,

Defendant,

and

DREW A. BARILE, DAVID CHANDO,
CHURCH HEALTHCARE, LLC d/b/a
INNOVA HEALTH AND REHAB AT MOUNT
LAUREL, KOHL 303, LLC d/b/a
KOHL PARTNERS, and its affiliate
KOHL ASSET MANAGEMENT,

Defendants-Respondents.

Argued October 15, 2014 - Decided November 6, 2014

Before Judges Fisher, Nugent and Manahan.

On appeal from the Superior Court of New
Jersey, Law Division, Burlington County,
Docket No. L-1468-11.

Peter A. Romero (Frank & Associates) of the New York bar, admitted pro hac vice, argued the cause for appellants (David D. Barnhorn, attorney; Mr. Barnhorn, on the brief).

Michael A. Katz argued the cause for respondent John Sung (Paul & Katz, P.C., attorneys; Mr. Katz, of counsel and on the brief).

Thomas E. Chase argued the cause for respondents Drew A. Barile, David Chando, Church Healthcare, LLC d/b/a Innova Health and Rehab at Mount Laurel, Kohl 303, LLC d/b/a Kohl Partners and its affiliate Kohl Asset Management (Rottenberg Lipman Rich, P.C., attorneys; Mark M. Rottenberg and Mr. Chase, on the brief).

PER CURIAM

In this appeal, we reverse a summary judgment entered in favor of defendants because, among other things, the trial judge mistakenly failed to view the facts in the light most favorable to plaintiffs or give plaintiffs the benefit of reasonable inferences emanating from those facts. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In reviewing the summary judgment by application of this same standard, W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012), we conclude that defendants were not entitled to summary judgment on: (1) the claim that plaintiffs' former employee breached his duty of loyalty; (2) the claim that defendants tortiously interfered with plaintiffs' existing and prospective economic relations; and (3) the claim that defendants engaged in unfair competition.

In applying the Brill standard, we assume the truth of the following. Plaintiffs are the operators of long-term care facilities in Eatontown and Maple Shade that include units exclusively dedicated to patients of Korean descent. Defendant John Sung was hired by plaintiffs in 2007 as director of the Korean aspects of the facilities. Defendant Church Healthcare, LLC, operates Innova Health and Rehab, which had an Asian unit that was in decline in late 2009 and early 2010 because of a loss of a referral source.

On April 21, 2010, Sung, while still employed by plaintiffs, met with Drew A. Barile, the CEO of Innova,¹ and David Chando, Innova's regional director of marketing. Innova was then seeking a director to revive its failing Asian program, to get the program "up and running off the ground." Sung was of the belief, as he expressed at his deposition, that a program that targets the Asian community in general "doesn't work[]" because, although the residents might all be Asian, they might have "totally different language[s] . . . [and] eat[] totally different food." At the April 21 meeting, the Innova representatives understood Sung was still employed by plaintiffs as the director of their Korean program. At the time, when discussing salary as well as a bonus structure based on

¹Barile is also a partner of defendant Kohl Partners, which had an ownership interest in Church Healthcare.

obtaining new patients, Sung told Barile and Chando that because of his affiliation with the Korean community as a preacher and a pastor, he could "bring people" to Innova; Chando testified at his deposition that he understood this to mean that Sung was "referring to . . . current residents of" plaintiffs' facilities.

That same day - again, while still employed by plaintiffs - Sung sent to Chando, by email, a list of thirty-two Korean residents in plaintiffs' facilities (hereafter sometimes referred to separately as "the Palace" and "Gateway") and stated that he could "transfer a minimum of twenty-five people, a maximum of thirty-two people to [Innova] within two weeks." In his deposition, Sung acknowledged that a minimum transfer of twenty-five people would come from, at least in part, plaintiffs' facilities.

On April 22, 2010 - the day after this meeting and email - Sung accepted Barile's offer of employment. Sung did not, however, advise plaintiffs of that fact nor did he resign his position with plaintiffs until April 27, 2010.

On April 23, 2010 - four days before Sung resigned - Innova began taking steps to facilitate the transfer of residents from plaintiffs' facilities. And, after the April 21 meeting but still before resigning, Sung contacted family members of

residents of the Palace and Gateway residents, as he explained in the following way at his deposition:

Q. . . . Jung had been a Palace resident and was in a hospital. Ordinarily when they're discharged from the hospital she would have returned to Palace, correct?

A. Generally like that, yes.

Q. Okay. And you had a conversation with Jung's son wherein you essentially told him, I'm going to be resigning my employment at Gateway and Palace or Palace and going to Innova?

A. Yes.

Q. And that was before you had resigned?

A. Yes.

. . . .

Q. Do you recall when that conversation with Jung's son took place in relation to your meeting on April 21st?

. . . .

Q. . . . Was it like the next day after the meeting, was it two days after the meeting?

A. I don't remember but after, clearly after, after 21st, the meeting.

Q. Okay. So you had conversations along those lines with other families where you told them, I'm going to be leaving Palace and Gateway and I'm going to be going to Innova?

A. Yes.

Q. Before you actually resigned, correct?

A. Yes.

Q. Approximately how many families did you speak to before you resigned at Gateway and Palace?

A. I don't remember.

Q. Okay. Do you think it was more than five?

A. I don't remember, but clearly I remember he - Jung's son also, he knows a lot of our same family from the Palace because they're kind of a church member. Our Korean community is kind of a narrow, small community. They know each other a lot. They call each other, and from that Jung is leaving Palace.

Q. I see. So what you're saying -

A. She wants me to come to the other family, too, but I don't remember how many family I contact. I contact a couple of family, but I don't remember how many, exact number.

Q. Okay. If you had to approximate it, you know, would it be between five and ten or ten and fifteen?

A. Five, ten approximately.

After meeting with Barile and Chando on April 21, but before Sung resigned from plaintiffs' employment, Innova's business office director prepared forms to effectuate the transfer of residents from plaintiffs' facilities to Innova; at least twenty-two of these transfer request forms, which are provided to the Department of Health, were dated April 23, 2010. Innova also had obtained twelve authorizations for the release

of the medical and financial records of plaintiffs' residents to Innova prior to Sung's resignation.

The number of transfers from plaintiffs' facilities to Innova was viewed as "unusual" by the Department of Health, which consequently conducted a site visit. The Department did not find that patients transferred because of dissatisfaction with plaintiffs' facilities; instead, Department representatives gathered that Sung was the cause for many transfers. The deposition testimony of one Korean-speaking Department representative, who was dispatched "to get a sense about what was going on," believed Sung was the catalyst:

Q. . . . [I]n your discussions with the residents or their family members did the subject of Mr. Sung come up?

A. Yes.

Q. And what was discussed in relation to Mr. Sung?

A. . . . Mr. Sung contacted the family member that they want the client to move to Innova.

Q. So the resident told you that Mr. Sung had contacted their family member?

A. Yes.

Other evidence revealed in discovery further suggested that Sung - while still employed by plaintiffs - had recommended to family members that residents move to Innova.

On April 27 - still prior to his resignation - Sung was asked by Barbara Darlington, Gateway's administrator, about "rumors that we're closing our unit and these patients are going to a placed called Innova." She explained that Sung "[t]otally denied everything," saying he did not know "anything about that" and had "never heard of Innova." Later that day, Sung approached Darlington to advise he was leaving the facility and would "never do anything to hurt you or Gateway." Plaintiffs assert that eighteen Korean residents of Gateway and twelve Korean residents of the Palace transferred to Innova, and the Korean units at both facilities closed. In referring to these circumstances, Barile emailed to Chando a month later to say that "[i]f not for me destroying another man's business" - referring to Gateway and Palace - "[Innova's] [M]ount [L]aurel [facility] would be almost dead."

Plaintiffs commenced this action on May 4, 2010, alleging various theories of recovery as a result of the circumstances outlined above. After the completion of discovery, defendants moved for and obtained summary judgment.

Plaintiffs appeal, arguing that the trial judge erred in granting summary judgment on their disloyalty, tortious

interference and unfair competition claims.² We reverse and remand for further proceedings.

I

We turn, first, to Sung's duty of loyalty. Although defendants appear to argue that the absence of a written contract between plaintiffs and Sung or the absence of a restrictive covenant binding Sung makes a difference - as the trial judge also suggested³ - in fact Sung was bound to common law duties notwithstanding. To be sure, an employee who is not bound by a restrictive covenant, and in the absence of a breach of trust, "may anticipate the future termination of . . . employment and, while still employed, make arrangements for some new employment by a competitor or the establishment of [a] business in competition with [the] employer." Auxton Computer Enters. Inc. v. Parker, 174 N.J. Super. 418, 423 (App. Div. 1980). But, as our Supreme Court has said, "the employee may not breach the undivided duty of loyalty . . . while still employed by soliciting the employer's customers or engaging in

²The judge's dismissal of other counts has not been challenged in this appeal.

³In dismissing the disloyalty count, the judge appears to have exalted in importance the absence of a restrictive covenant, stating: "this is an employee who had no contract, no noncompete, no nothing." In fact, there was "something"; Sung owed plaintiffs a duty of loyalty.

other acts of secret competition." LaMorte Burns & Co. v. Walters, 167 N.J. 285, 303 (2001); see also Auxtun Computer, supra, 174 N.J. Super. at 423; United Bd. & Carton Corp. v. Britting, 63 N.J. Super. 517, 524 (Ch. Div. 1959), modified, 61 N.J. Super. 340 (App. Div.), certif. denied, 33 N.J. 326 (1960); Platinum Mgmt., Inc. v. Dahms, 285 N.J. Super. 274, 303 (Law Div. 1995).

Here, there is no doubt - because Sung admitted at his deposition and an email memorialized - that Sung, while still employed by plaintiffs, provided his future employer with a list of plaintiffs' Korean residents. This action alone allows for an inference that Sung attempted to and was successful in having some of these residents transfer to Innova. In fact, Sung did not deny that he spoke to many family members while still employed by plaintiffs. See Cameco, Inc. v. Gedicke, 157 N.J. 504, 516 (1999) (holding that "[a]ssisting an employer's competitor can constitute a breach of the employee's duty of loyalty"); Restatement (Second) of Agency, § 393 comment e (1958) (recognizing that an employee may not "solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business"); see also Chernow v. Reyes, 239 N.J. Super. 201, 204-05 (App. Div.), certif. denied, 122 N.J. 184 (1990). The trial judge's conclusion that the factual record

did not adequately demonstrate a viable claim of disloyalty to defeat summary judgment reveals a misunderstanding of the applicable legal principles and a misapprehension of the Brill standard. Indeed, the judge's ultimate conclusion on this cause of action - that there was no evidence that Sung said to residents "you have to move" to Innova - places far too heavy a burden on plaintiffs, particularly when the record demonstrated other conduct so blatantly inconsistent with Sung's duty of loyalty.

Plaintiffs were not obligated to provide direct evidence of the breach and its nexus with the loss of plaintiffs' residents to Innova; it was enough that plaintiffs provide factual support for inferences that might be drawn to fill any aspect of the cause of action as to which there was no direct evidence. Judges should be mindful that it is not common for targets of such claims to provide direct evidence of their wrongful conduct or complicity. See Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 271 (2004). Considering Sung's own admissions at his deposition, the trial judge was obligated to deny summary judgment on this cause of action.⁴

⁴We need only briefly express our disagreement with defendants' argument that Totaro, Duffy, Cannova & Co., L.L.C. v. Lane, Middleton & Co., L.L.C., 191 N.J. 1 (2007) is "directly relevant to the proximate cause issues presented." That case is strikingly different because the Court focused only on the
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II

The judge's mistaken ruling on the disloyalty claim infected her ruling on plaintiffs' claim that defendants tortiously interfered with existing or prospective economic relations. To prove such a claim, a plaintiff must show "it had a reasonable expectation of economic advantage that was lost as a direct result of defendants' malicious interference, and that it suffered losses thereby." LaMorte Burns, supra, 167 N.J. at 305-06. Causation is present when it can be demonstrated "that if there had been no interference there was a reasonable probability that the victim of the interference would have received the anticipated economic benefit." Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 185-86 (App. Div.) (quoted with approval in LaMorte Burns, supra, 167 N.J. at 306), certif. denied, 77 N.J. 510 (1978). And, although this common law theory has been described as requiring "malicious intent," our

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"narrow issue concerning the trial court's calculation of damages and the sufficiency of the evidence adduced at trial in support of that award." Id. at 4. And, in that regard, the Court recognized that the damage award was based on "undisputed evidence that all of the clients would have left plaintiff and retained defendant." Id. at 17 (emphasis added). The matter at hand does not permit a conclusion, by way of summary judgment, that the residents that departed plaintiffs' facilities would inevitably have moved to Innova had Sung and his future employer not acted in derogation of Sung's duty of loyalty to plaintiffs.

Supreme Court described the nature of this element in the following way:

Malice is not used here in its literal sense to mean "ill will"; rather, it means that harm was inflicted intentionally and without justification or excuse. It is determined on an individualized basis, and the standard is flexible, viewing the defendant's actions in the context of the facts presented. Often it is stated that the relevant inquiry is whether the conduct was sanctioned by the "rules of the game," for where a plaintiff's loss of business is merely the incident of healthy competition, there is no compensable tort injury. The conduct must be both "injurious and transgressive of generally accepted standards of common morality or of law." The line clearly is drawn at conduct that is fraudulent, dishonest, or illegal and thereby interferes with a competitor's economic advantage.

[LaMorte Burns, supra, 167 N.J. at 306-07 (internal citations omitted).]

Here, the evidence was sufficient to permit an inference, if not logically compel the conclusion, that when Sung sent to defendants a list of plaintiffs' Korean residents with the suggestion he could cause their transfer - on the same day of his job interview with defendants - that he was not merely preparing his move to a new employer but was not playing by "the rules of the game." Plaintiffs were entitled to inferences not only that Sung had breached his duty of loyalty but that defendants also realized this. Certainly, the record reveals that defendants never returned the list of plaintiffs' residents

or advised Sung that he should take no action against plaintiffs until leaving their employ. A finder of fact could infer that defendants were willing players in Sung's tortious activities.

Because the evidence, viewed in the light most favorable to plaintiffs, suggests that defendants transgressed "accepted standards of common morality or of law," the judge was required to deny defendants' motion for summary judgment on this cause of action.

III

The summary judgment dismissing plaintiffs' unfair competition claim falls for similar reasons. Indeed, we have recognized that the essence of an action alleging unfair competition is "fair play." Ryan v. Carmona Bolen Home for Funerals, 341 N.J. Super. 87, 92 (App. Div. 2001); Columbia Broad. Sys., Inc. v. Melody Recordings, Inc., 134 N.J. Super. 368, 376 (App. Div. 1975).⁵

⁵As Judge Jayne colorfully explained for this court in an earlier case:

A lecturer on the subject which is identified in the law as "Unfair Competition" once asked a student for his conception of the subject. The student replied: "Well, it seems to me that the courts try to stop people from playing dirty tricks." It is difficult to discover in the many adjudications a definition more satisfactory. The theme is said to exemplify

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As already observed, plaintiffs were entitled, in opposing defendants' summary judgment motion, to the judge's assumption that defendants' Asian group was moribund, that Sung was interviewed for a position to shore up that group, that Sung suggested he could deliver at least two dozen residents from his employer, that he provided a list of the targeted residents the same day of his interview, and that defendants apparently made no attempt to halt Sung's disloyal activities until he resigned from plaintiffs' employ. Indeed, in the wake of these events, defendants' CEO acknowledged Innova's Mount Laurel facility would be "almost dead" if he had not, in referring to plaintiffs, "destroy[ed] another man's business." It must be for a jury, and not a judge at the summary judgment stage when opposed with such evidence, to determine whether defendants' played fair.

Summary judgment is reversed and the matter remanded for trial.

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the embodiment in the law of the ancient rule of the playground - "Play fair."

[Am. Shops, Inc. v. Am. Fashion Shops of Journal Sq., Inc., 13 N.J. Super. 416, 420 (App. Div. 1951).]

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

A handwritten signature in black ink, appearing to be 'JWA', written over the text 'file in my office'.

CLERK OF THE APPELLATE DIVISION