

## Unpublished Disposition

942 N.E.2d 208

Only the Westlaw citation is currently available.

NOTE: THIS OPINION WILL NOT APPEAR  
IN A PRINTED VOLUME. THE DISPOSITION  
WILL APPEAR IN A REPORTER TABLE.

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

Appeals Court of Massachusetts.

M/K SYSTEMS, INC.

v.

Jonathan GLESMANN & another.<sup>1</sup>

No. 10-P-362. March 4, 2011.

By the Court (CYPHER, BROWN &amp; GRAINGER, JJ.).

**Opinion****MEMORANDUM AND ORDER  
PURSUANT TO RULE 1:28**

*\*I* This is a trade secrets case involving laboratory equipment designed to test the absorbency of paper products such as paper towels, napkins, and diapers. The plaintiff, M/K Systems, Inc., is primarily a family owned and operated business that manufactures a device here at issue—the Gravimetric Absorbency Testing machine (GATS). The defendant, Jonathan Glesmann, is a former employee and director of M/K Systems who founded and operates a competing business, the codefendant, Greenwood Instruments, LLC. M/K Systems appeals from a judgment on a jury verdict for the defendants on its claims of misappropriation of confidential and proprietary business information, breach of fiduciary duty and duty of loyalty, conversion, tortious interference with advantageous business relations, and aiding and abetting a breach of fiduciary duty. It asserts discovery misconduct by the defendants which entitled it to relief, denied by the judge, under Mass.R.Civ.P.

60(b)(3), 365 Mass. 828 (1974). It also appeals from the judge's dismissal of its claims pursuant to G.L. c. 93A, and its request for permanent injunctive relief. Finally, it asserts entitlement to a new trial, claiming that the verdict was against the weight of the evidence. We affirm, referring to the facts as pertinent.

*Discussion.* M/K Systems' primary claims on appeal can be reduced to the argument that the record does not support the jury's verdicts and the judge's findings.<sup>2</sup> We review the evidence to determine whether it provided a reasonable basis for the fact finders to arrive at their conclusions. See *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 420, 837 N.E.2d 1121 (2005); *O'Brien v. Pierson*, 449 Mass. 377, 384, 868 N.E.2d 118 (2007). In so doing we refer to the judge's findings that M/K Systems “took minimal steps to protect the design or components of [their machines] from competitors or the public-at-large.” Evidence before both the judge and the jury included the following: M/K Systems never (a) entered into confidentiality agreements with customers (that were designed to protect M/K Systems), (b) entered into confidentiality agreements with parts suppliers or third-party manufacturers (other than after-the-fact and now expired agreements with Thermo Craft and Pro-tech Instruments, Inc.), (c) entered into noncompete agreements with employees (other than a two-year noncompete agreement with Glesmann that was honored in full), or (d) patented or copyrighted any aspect of its product designs. The judge also found, apparently without protest from any party, that the GATS originally sold by M/K Systems was protected by a patent acquired by Johnson & Johnson, and that over the course of time, M/K Systems made changes to the Johnson & Johnson-based machine. For example, the company replaced the device's spring mechanism with a motor, and added a microprocessor board to retrieve data and to make calculations. Although the products looked the same, M/K Systems was able to claim them as different products and no longer sold the modified GATS subject to the Johnson & Johnson licensing agreement. The record contains ample evidence that M/K Systems did not protect, mark, or otherwise indicate as confidential any information regarding its updated or altered GATS design. See, e.g., *J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc.*, 357 Mass. 728, 738, 260 N.E.2d 723 (1970) (“[I]f the person entitled to a trade secret wishes to have its exclusive use in his own business, he must not fail to take all proper and reasonable steps to keep it secret. He cannot lie back and do nothing to preserve its essential secret quality, particularly when the subject matter of the process becomes known to a

number of individuals involved in its use or is observed in the course of manufacture within plain view of others”).

\*2 In sum, the record provides ample evidence on which both the jury and judge could infer the absence of any confidential or proprietary nature attributable to the GATS. This determination is alone sufficient to support the entry of judgment for the defendants.<sup>3</sup>

M/K Systems' case suffered from additional defects. Chief among them was the failure to establish any damages resulting from the actions of the defendants that formed the basis of the complaint, a failure that prevented M/K Systems from establishing “an essential element of the cause of action under G.L. c. 93A, § 11.” *Walsh v. Chestnut Hill Bank & Trust Co.*, 414 Mass. 283, 290 n. 7, 607 N.E.2d 737 (1993), quoting from *Weeks v. Harbor Natl. Bank*, 388 Mass. 141, 144 n. 2, 445 N.E.2d 605 (1983).

Additionally we note that even if M/K Systems had taken steps to protect knowledge it claims to be proprietary and had additionally proffered some measure of damages, there was

ample evidence before the judge and jury to support findings that no misappropriation occurred. The evidence supported a finding that the defendants used a different internal circuit board and a different command system so that, unlike M/K Systems, their GATS would allow continuous “real time” data retrieval during operation. As phrased by the judge, “although the mechanical functions of the parties' GATS machines were essentially similar, the manner in which their respective systems were programmed and computer-operated are different.”<sup>4</sup>

*Judgment affirmed.*

*Order denying motion for new trial affirmed.*

*Order on G.L. c. 93A claims affirmed.*

*Order denying motion for relief from judgment affirmed.*

#### Parallel Citations

942 N.E.2d 208 (Table), 2011 WL 744870 (Mass.App.Ct.)

#### Footnotes

- 1 Greenwood Instruments, LLC.
- 2 The claims on which we focus are directed to the judge's refusal to find the defendants had violated G.L. c. 93A and his refusal to grant a new trial. The remaining claims discussed, *infra*, refer to spoliation of evidence and the refusal to grant relief under Mass.R.Civ.P. 60(b)(3); these require that the alleged misconduct be of such a nature that it would be inequitable for the offending party to retain a benefit secured thereby—that in effect the moving party was prevented thereby from presenting its case. Reporters' Notes to Mass.R.Civ.P. 60(b)(3), Mass. Ann. Laws, Rules of Civil Procedure, at 1110 (LexisNexis 2010). As our discussion indicates, we conclude that M/K Systems has not met this test. See n. 4 *infra*.
- 3 M/K Systems' claim that Glesmann breached his fiduciary duties is likewise without support. Information properly acquired by an officer is not automatically rendered confidential based solely on that individual's position within a corporation. *Chomerics, Inc. v. Ehrreich*, 12 Mass.App.Ct. 1, 6 n. 9, 421 N.E.2d 453 (1981). An employee may make use of general skills or knowledge acquired during the course of employment; he is not required, upon termination of said employment, to set forth all knowledge gained “[so that] he is forever precluded from employing such thoughts in a competitive enterprise.” *Id.* at 9 n. 16, 421 N.E.2d 453 (citation omitted).
- 4 As we conclude that the plaintiff's case was legally insufficient in the many respects cited above, which are unrelated to the discovery at issue, it is clear that relief under rule 60(b)(3) was properly denied because the defendants did not secure any additional benefits even if the alleged discovery violations have any basis in fact.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.