Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2002 WL 1613845 (Cal.App. 5 Dist.))

Court of Appeal, Fifth District, California.
Jose FLORES, Petitioner,
v.
SUPERIOR COURT of the State of California, in and for the County of Fresno, Respondent.
DECKER FORD, INC., Real Party in Interest.

No. F039338.
(Super.Ct.No. 00CECG10238).
July 19, 2002.

Purchaser brought action asserting a variety of claims against automobile dealer, including violation of the Consumer's Legal Remedies Act, fraud, negligent misrepresentation, and rescission. The Superior Court, Fresno County, No. 00CECG10238,Lawrence Jones and Mark W. Snauffer, JJ., granted dealer's motion to quash portion of subpoena and denied purchaser's motion to compel arbitration. Purchaser petitioned for writ of mandate. The Court of Appeal held that: (1) dealer's customer lists constituted trade secrets; (2) dealer's customer lists were discoverable subject to protective orders; (3) purchaser's writ petition was not subject to denial based on failure to file petition within 60 days of superior court's ruling and based on fact that purchaser had remedy of renewing motion upon establishing relevance and need; and (4) issue of whether purchaser could maintain fraud action against automobile dealership as a representative action on behalf of general public was not relevant to discovery dispute.

Writ partially granted.

Automobile dealership's customer lists were discoverable subject to protective orders in purchaser's fraud action against dealer, despite being trade secrets and potential privacy concerns, where plaintiff was a purchaser rather than a competitor, lists were necessary to prove purchaser's claims, and seeking merely the identity of customers did not invade any

Whether purchaser could maintain fraud action against automobile dealership as a representative action on behalf of general public was not relevant to whether dealer's customer lists were discoverable, despite dealer's reference to document entitled vehicle prior history disclosure, where lists were necessary for purchaser to establish individual claim, signatures on document were illegible, and no direct evidence demonstrated that purchaser had read or understood document.

ORIGINAL PROCEEDING: Petition for Writ of Mandate, Superior Court of Fresno County. Lawrence Jones and Mark W. Snauffer, Judges.William M. Krieg for Petitioner.

No appearance for Respondent.

Gregory J. Goodwin and Shana A. Bagley, for Real Party in Interest.

OPINION

THE COURT.[FN*]

FN* Before Buckley, Acting P.J., Wiseman, J., and Levy, J.

PROCEDURAL AND FACTUAL HISTORY

*1 On August 24, 2000, petitioner Jose Flores (hereafter petitioner) filed a complaint in Fresno County Superior Court against Decker Ford, Inc., d.b.a. Ford Motor Company (hereafter Decker). The complaint alleged causes of action for (1) failing to provide Spanish language translations of agreements (Civ.Code, § 1632); (2) a violation of the Consumer's Legal Remedies Act (Civ.Code, § 1750); (3) fraud and deceit-intentional misrepresentation, concealment, failure to disclose; (4) negligent misrepresentation; (5) unfair business practices (Bus. & Prof.Code, § 17200 et seq); (6) untrue and misleading advertising (Bus. & Prof.Code, § 17500); and (7) rescission.

As indicated by the petitioner, "[r]elevant allegations for the purposes of this Petition are that [Decker] intentionally misrepresented and failed to disclose that the vehicle it sold to [petitioner] was a former daily rental vehicle ("Rent-A-Car," "RAC") [citation], and

that this was done as part of a 'pattern, plan and scheme directed at [petitioner] and similarly situated members of the public.' "

Petitioner propounded special interrogatories intended to discover the identities of other rental vehicles sold by Decker and the purchasers of those vehicles in order to determine the existence of other similar incidents of unfair or deceptive sales. The superior court denied petitioner's motion to compel responses to those interrogatories. Petitioner then issued a subpoena duces tecum to the auto auction at which petitioner's vehicle was purchased by Decker seeking in part the identities of other rental vehicles sold to Decker through auction. The superior court granted Decker's motion to quash that portion of the subpoena. Decker also obtained an order that prohibited petitioner's attorney from seeking Decker's customer list from Decker or other parties and from having contact with Decker's customers.

As to petitioner's motion to compel, the superior court found that petitioner's interrogatories were unduly invasive of the third parties' right of privacy, and that petitioner failed to show that his need to discover the information outweighed former customers' interests in keeping their identities private. Regarding the subpoena, the superior court found that petitioner was entitled to neither the identities of similarly situated consumers nor the vehicle identification numbers ("VINs") of other RACs because witnesses have a right of privacy in their identities; and that petitioner did not show the information sought was directly relevant to his causes of action. The superior court also noted that petitioner offered no evidence that there were other, similar incidents involving the other witnesses whose identities were sought.

DISCUSSION

"Ordinarily information which is relevant to the subject matter of a law suit and not privileged is discoverable. However, a limited protection is given to sensitive information which people may wish to keep confidential, such as their financial dealings [citation] and assets [citation]. 'Where objection is made to discovery of such sensitive information in the trial court, the court must carefully weigh the competing factors in fashioning an order, considering: "... the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances ...." [Citation.]' [Citations.] Where the court abuses its discretion in applying this balancing test and fashioning its order, relief is available by writ of mandate. [Citation.]" (*Hofmann Corp. v. Superior Court* (1985) 172 Cal.App.3d 357, 362, 218 Cal.Rptr. 355; fn. omitted.)

*2 A trade secret is defined in Civil Code section 3426.1, subdivision (d) as follows:

"(d) 'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

"(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

"(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Customer lists have, in certain circumstances, been held to satisfy the definition of a trade secret. (See, e.g., *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal.App.3d 1318, 228 Cal.Rptr. 713; *Hofmann Corp. v. Superior Court* (1985) 172 Cal.App.3d 357, 218 Cal.Rptr. 355.)

Petitioner claims the information sought cannot be protected as a trade secret because no independent economic value can be derived from keeping the identities of Decker's customers secret. We disagree.

By not providing information about its car sales, Decker has an advantage over competitors involving such things as routine car maintenance (e.g., oil changes, tune-ups, etc.). By knowing when a vehicle was last serviced or serviced prior to sale, Decker has a good idea when it will next need service. One can easily imagine Decker, approximately three months after every sale, sending a postcard to the buyer, and encouraging the customer to return to its service department. Alternatively, Decker could send notices to previous customers, inquiring whether the customer may be in the market for another vehicle, and en-

courage repeat business. Having knowledge of when the used car was sold clearly has "potential" economic value to Decker. It is information not generally known to the public which can be used to obtain economic value from its disclosure.

Petitioner also contends the information sought is not entitled to trade secret protection because "the identities of [Decker's] customers are no secret." Petitioner attempts to substantiate this claim by proffering that the customers can be "readily identified" from license plate frames advertising the name of the dealership. This argument fails to merit any serious discussion. We seriously doubt whether forcing a competitor to drive around town, aimlessly searching for license plate frames would constitute being "readily identifiable." If this were a viable option, one can only ask why petitioner chose not to obtain the identity of Decker's customers in this manner. Contrary to petitioner's contention, the information sought is not "generally known" as required in the independent economic value prong.

We conclude that petitioner has failed to show that Decker's customer list does not qualify under Civil Code section 3426.1, subdivision (d) as a trade secret.

However, the fact that the customer list is a trade secret, does not mean the information is per se not discoverable, and thus end our analysis. (*Hofmann Corp. v. Superior Court, supra*, 172 Cal.App.3d 357, 218 Cal.Rptr. 355.) We first note the configuration of the parties here. Petitioner is not a competitor of Decker, seeking any sort of direct business advantage. Courts presume that disclosure to a competitor is more harmful than disclosure to a noncompetitor.

*3 Another important factor is whether nondisclosure of a trade secret would help perpetuate fraud. Evidence Code section 1060 provides, "If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."

The essence of petitioner's claims is fraud. They allege Decker's failure to disclose certain information about the vehicle purchased was both intentional and part of a pattern and practice by Decker involving automobiles which were previous daily rentals. Petitioner seeks exemplary damages. Under these circumstances, allowing Decker to hide behind the claim of trade secret privilege runs counter to Evidence Code section 1060. Absent the requested information, petitioner would have no other way to prove his allegations.

While the customer list is, as a general matter, subject to trade secret privilege, as stated in the California Law Revision Commission comment to Evidence Code section 1060:

> "... there are dangers in the recognition of such a privilege.... Again, disclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous materials by the party asserting the privilege. Recognizing the privilege in such cases would amount to a legally sanctioned license to commit the wrongs complained of, for the wrongdoer would be privileged to withhold his wrongful conduct from legal scrutiny."

At the same time, we recognize the potential privacy concerns of Decker, and the interests of its customers, with respect to allowing petitioner unfettered access to the information he seeks.

Article I, section I of the California Constitution provides:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy."

However, "the constitutional amendment does not preclude every incursion into individual privacy ... 'any such intervention must be justified by a compelling interest' [Citation.]...." (*Willis v. Superior Court* (1980) 112 Cal.App.3d 277, 297, 169 Cal.Rptr. 301.) "[T]here exist zones of privacy covering sensitive areas of personal information in which the scope of discovery may be diminished or qualified by a protective order fashioned to accommodate the competing values of the individual right to privacy and, ..., the 'important state interest of facilitating the ascertainment of truth in ... legal proceedings.' [Citations.]" (*Ibid.*)

Here, the thrust of petitioner's requested information does not invade any of the recognized "zones of privacy." (See e.g., *Britt v. Superior Court* (1978) 20 Cal.3d 844, 143 Cal.Rptr. 695, 574 P.2d 766 [membership in associations]; *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 125 Cal.Rptr. 553, 542 P.2d 977 [financial information of third parties]; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 174 Cal.Rptr. 160 [personnel records].) It merely seeks the *identity* of the customers, not protected information such as the customer's financial or credit background, price paid for the car, or insurance information. When balanced against petitioner's need for this information, the asserted privacy interest (i.e., that a customer has a right not to have their name released as a recent used car purchaser) does not measure up.

*4 By not allowing petitioner *any* access to the information requested in the special interrogatories, the trial court has all but eliminated his ability to prove some of his claims. The manner in which petitioner must prove his pattern and practice allegation is through the experience of other similar customers. Based on the balancing required, the trial court's complete denial of access to this information was an abuse of discretion.

The more effective method to balance the trade secret privilege and potential privacy concerns against petitioner's need to have the information is through protective orders. Use of the requested information can be limited, for example, through a "Colonial letter" [FN1] or by restricting disclosure of the information to only those directly involved in this case. By crafting appropriate protective orders, the trial court can properly serve the interests of both petitioner (in trying to prove his claims) and Decker (in limiting potential invasion of privacy concerns).

> FN1. Named after *Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 183 Cal.Rptr. 810, 647 P.2d 86, this is essentially a limited discovery inquiry, approved by the court, directed to the customers of one of the parties by the opposing party.

Additionally, if disclosure of the information does not establish the pattern and practice claimed by petitioner, disclosure would serve dual purposes. First, it brings these claims to closure. Second, it would eliminate any fears Decker may have that counsel for petitioner only wants the information to solicit new clients. After all, if Decker has not engaged in the alleged conduct, it has nothing to fear.

Therefore, based on our finding that Decker's customer list is a trade secret, and balancing the needs of all parties regarding the information requested, we find the trial court abused its discretion in rejecting completely petitioner's efforts to obtain the identities of customers who purchased rental vehicles.

Lastly, Decker advances several contentions why relief should be denied on a discretionary basis.

Decker first contends that this petition should be denied because it was not filed within 60 days of the superior court rulings and because petitioner has a remedy of renewing his motion upon adequate facts establishing "relevance and need." The 60-day limit and whether alternative remedies are adequate are discretionary considerations allowing for flexibility. Decker does not establish that any prejudice resulted from the relatively minor delays. Courts have recognized that discretion weighs in favor of reviewing on its merits "a *denial* of discovery by the trial court." (*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 170, fn. 11, 84 Cal.Rptr. 718, 465 P.2d 854.) The relevance and need for obtaining some discovery now upon the showing made by petitioner before the Superior Court has already been discussed in this opinion.

Decker also contends that "[p]etitioner cannot maintain this action as a 'representative' action." For the reasons discussed above, the discovery sought by petitioner is relevant to and necessary for his individual claims. It is unnecessary for this court to evaluate the feasibility of litigating these matters as a representative action.

*5 Decker's reliance on the document titled "vehicle prior history disclosure" is misplaced. The declaration of Phil Sage merely states that it was found in "Decker Ford, Inc.'s file regarding the motor vehicle lease between it and Plaintiff Jose C. Flores [and was] dated January 3, 1998.... Item no. 7 'private rental vehicle' is circled. There is a signature on the buyer's line, of this document, which I assume is Mr. Flores'." (Emphasis added.) The signatures on that document

are virtually illegible. Decker did not show that one of those signatures resembled the signature of petitioner on other documents from the file. No declarations were submitted from witnesses to the signatory process involving that document. Even if petitioner did sign it, Decker did not present any direct evidence that petitioner read or understood it. The gist of the allegations in the complaint is to the contrary. The ambiguities inherent in the document prevent its use as a reason to foreclose discovery.

In other words, the record before this court does not establish that the superior court abused its discretion in its resolution of these issues as follows:

> "[Decker's] contention that [petitioner] is not qualified to bring a representative action on behalf of the general public is not an appropriate argument to raise in the context of a discovery motion. Regardless of the merits of [Decker's] position, the court cannot strike allegations from [petitioner's] complaint as part of its ruling on a motion to compel further responses. If [Decker] believes that [petitioner's] 'general public' allegations are unfounded, it can file a motion to strike. In the meantime, the allegations stand, and [Decker] must respond to otherwise valid discovery requests related to those allegations."

DISPOSITION

Let a writ of mandate issue directing the trial court to vacate *only* those portions of the orders filed on June 12, 2001, and August 27, 2001, denying or prohibiting access to customers' identities which are inconsistent with the views expressed in this opinion, to reconsider said portions and to enter new orders granting petitioner appropriate access to lists of customers who purchased rental vehicles limited by protective orders in accordance with this opinion.

Costs are awarded to petitioner.

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Flores v. Superior Court
Not Reported in Cal.Rptr.2d, 2002 WL 1613845 (Cal.App. 5 Dist.)

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