



Missouri Court of Appeals

Southern District

Division One

CENTRAL TRUST AND INVESTMENT
COMPANY,

Plaintiff-Appellant,

vs.

TROY KENNEDY, ITI FINANCIAL
MANAGEMENT, LLC,

Defendants,

and SIGNALPOINT ASSET MANAGEMENT, LLC,

Defendant-Respondent.

No. SD31658
Filed: January 24, 2013

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Michael Cordonnier, Circuit Judge

AFFIRMED.

Central Trust and Investment Company (“Central Trust”) appeals the trial court’s grant of summary judgment in favor of SignalPoint Asset Management, LLC (“SignalPoint”), on Central Trust’s “First Amended Petition for Damages and Injunctive Relief.”¹ Central Trust also appeals the trial court’s denial of its motion for reconsideration of summary judgment and for new trial

¹ Defendants Troy Kennedy and ITI Financial Management, LLC were also defendants in the original lawsuit, but are not parties in this appeal.

based on newly discovered evidence. Central Trust asserts four points of trial court error. We affirm the judgment of the trial court.

Factual and Procedural Background

Springfield Trustshares and its holding company, Springfield Trust & Investment Company (“STC”), were founded in 1991 by John Courtney (“Courtney”) to provide personal financial management services to clients. Troy Kennedy (“Kennedy”) began working for STC in 1992. While Kennedy’s role fluctuated throughout his time with STC, his duties included acting as an executive vice-president, a shareholder, an officer, and a director; however, his primary job expectation was to develop new business and act as a relationship manager to business already acquired by STC. In 2008, Kennedy signed the “Troy E. Kennedy Employment Contract” (“employment contract”) with STC that was to be in effect for a period of six years from January 1, 2008, to December 31, 2013. Contained within that employment contract was the following non-compete provision:

In consideration for the Employment Agreement, the Employee hereby covenants for a period of three (3) years and within one hundred (100) mile radius of Springfield, MO: a. Not to solicit [STC] clients; b. Not to solicit [STC] employees and clients to terminate their relationship with [STC]; c. Not to accept employment with or in any other manner engage in a business which, directly or indirectly, competes with [STC] within a one hundred (100) mile radius of Springfield, MO and; d. provided STC’s revenue do not fall below four million dollars (\$4,000,000) in any twelve (12) month period not to refer STC clients or prospects to any individual or business which directly or indirectly competes with STC[.]

The provision went on to state that:

Notwithstanding the above, this Agreement and the covenant not to compete shall become void and unenforceable in the event of a sale of [STC] or a sale of a controlling interest in [STC]. This covenant not to compete shall not be applicable if a substantial interest in [STC] is sold (more than 50% of the stock) to individuals or other entities who are not shareholders as of 1/1/2007.

Attached to this employment contract, was “the list of Corporation clients” apparently managed by Kennedy.² Thereafter in July 2009, Kennedy, as an STC director, signed an “OATH OF DIRECTOR” with STC that also contained a confidentiality agreement.³ The primary reason STC asked its Directors to sign the oath was due to the fact that it was negotiating a possible sale of the company to Central Trust. It appears from the record that negotiations between Central Trust and STC began in March 2009, and that Kennedy, as well as other employees, was aware of the possible transaction at around that time. In fact, Kennedy began making preparations to leave STC, in the event of the sale to Central Trust, including telling clients about his intent to potentially leave STC and even soliciting their potential business upon his departure.⁴

Central Trust purchased STC on November 20, 2009. Kennedy’s employment with STC ended that date and the following day he founded ITI Financial Management, LLC (“ITI”), an entity that, as a direct competitor of Central Trust, provided financial advice and investment management services to investors. After forming ITI, Kennedy admittedly solicited clients from

² A copy of this client list was not attached to any of the copies of the employment contract in the legal file.

³ The “CONFIDENTIALITY AGREEMENT” in the oath stated:

I agree not to use for any purpose, or disclose to any person or entity, any confidential information acquired during the course of my term of service as a Director of [STC]. I shall not directly or indirectly, copy, take, or permanently remove any of the Company’s books, records, customer lists, or any other documents, materials, or confidential information. The term “Confidential Information” as used in this Agreement includes, but is not limited to: (a) information of a business nature such as, but not limited to, records, lists, and knowledge of the Company’s clients, suppliers, methods of operations, information about costs, purchasing, profits, markets, sales, methods of determination of prices, financial condition, net income, and indebtedness, etc.; (b) information of a scientific or technical nature such as, but not limited to, know-how, processes, procedures, designs, research and development results, whether successful or unsuccessful, engineering drawings, computer software, trade secrets, investment strategies, etc.; (c) new business or product development information, business or marketing strategies, future development plans or ideas, projections, or estimates, etc.; and (d) information regarding clients’ personal information including but not limited to, contact information, net worth, account balances with [STC] or any other places of investment.

⁴ Further, apparently in August 2009, Kennedy, upon the advice of counsel, placed a cell phone containing the contact information of approximately 200 STC clients, as well as written client contact lists, into a safety deposit box. This fact was revealed to Central Trust in May 2011 during Kennedy’s deposition.

Central Trust.⁵ Due to licensing requirements, Kennedy chose for ITI to associate with SignalPoint and on February 22, 2010, he signed an “Investment Advisor Representative Agreement” with SignalPoint. This agreement provided, *inter alia*, that Kennedy was an independent contractor; had “no right to bind [SignalPoint] by any statement, promise, representation, agreement, or contract of any kind, or to waive any of [SignalPoint’s] rights or to obligate [SignalPoint] in writing[.]”; SignalPoint would serve as Kennedy’s registered investment advisor; and Kennedy and ITI could represent an affiliation with SignalPoint. Kennedy never provided any of STC or Central Trust’s client lists to SignalPoint.

On January 5, 2010, Central Trust filed suit against Kennedy and ITI asserting such claims as misappropriation of trade secrets, breach of fiduciary duty, tortious interference with business relations, breach of contract based on the signed Oath of Director, breach of Kennedy’s employment contract, and civil conspiracy. Central Trust then filed its “FIRST AMENDED PETITION FOR DAMAGES AND INJUNCTIVE RELIEF” on September 7, 2010, in which it added claims against SignalPoint. Central Trust asserted the following causes of action against SignalPoint: “COUNT VI: TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS”; “COUNT VII: MISAPPROPRIATION OF TRADE SECRETS”; and “COUNT VIII: CIVIL CONSPIRACY.” Kennedy and ITI filed their joint “MOTION FOR SUMMARY JUDGMENT” on May 20, 2011, and on May 27, 2011, SignalPoint filed its “MOTION FOR SUMMARY JUDGMENT.” A series of additional responses and replies from the various parties followed thereafter. A hearing on the aforementioned motions was held on July 6, 2011, and the trial court took the matter under advisement.

On July 13, 2011, the trial court granted summary judgment in favor of SignalPoint on all counts of Central Trust’s First Amended Petition, and on the following day, it denied Kennedy

⁵ By May 2010, 85 of ITI’s 90 clients were former STC or Central Trust customers.

and ITI's Motion for Summary Judgment by finding "there remains one or more genuine issue[s] of material fact[.]" Additionally, the trial court entered a separate "ORDER" on July 14, 2011, that specifically stated: "[The parties] have each suggested to the [trial court] that the issue of whether or not the identity of [STC's] customers/clients, under the factual circumstances of this particular case, should be considered as "Trade Secrets" is a matter of law, which the [trial court] must determine." The trial court noted that having reviewed the Missouri Uniform Trade Secrets Act ("MUTSA"), as well as case law and treatises relating to trade secrets, STC "could not claim it protected the confidentiality of its customers/client's identities such that they might be considered a Trade Secret. [Central Trust's] claim can be no more persuasive tha[n] its predecessor." As a result, it concluded "the identities of [Central Trust's] customers/clients is not, as a matter of law, a Trade Secret as that term is used in [MUTSA]." On July 26, 2011, the trial court entered its "Amended [sic] SUMMARY JUDGMENT . . ." in favor of SignalPoint in which it concluded "there is no genuine issue as to any material fact and [SignalPoint] is entitled to a judgment as a matter of law as to all counts of [Central Trust's] First Amended Petition[.]" As a result, the trial court entered judgment in favor of SignalPoint on "Counts VI, VII, and VIII of [Central Trust's] First Amended Petition" and decreed its "judgment shall be final for purposes of appeal and there is no just reason for delay."

On August 25, 2011, Central Trust filed its "MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT ENTERED IN FAVOR OF . . . [SIGNALPOINT] . . . ON ITS MOTION FOR SUMMARY JUDGMENT AND FOR NEW TRIAL ON THE MERITS." The basis for this motion was Central Trust's assertion that new evidence had been discovered since the ruling on the motion for summary judgment in that it had been revealed Kennedy had placed a cell phone containing customer contact information, as well as paper copies of documents

containing customer contact lists, in a safety deposit box prior to his departure from STC. A hearing was held and offers of proof were made by Central Trust, but the motion was ultimately denied by the trial court. This timely appeal followed.

The issues presented for our determination are:

1. Did the trial court err in entering summary judgment in favor of SignalPoint on the claim for misappropriation of trade secrets because there were genuine issues of material fact as to whether Central Trust's confidential client information constituted a trade secret?⁶
2. Did the trial court err in entering summary judgment in favor of SignalPoint on the claim for interference with business relations because there were genuine issues of material fact as to whether Central Trust had valid business expectancies?
3. Did the trial court err in entering summary judgment in favor of SignalPoint on the claim for civil conspiracy because there were genuine issues of material fact as to whether the client lists at issue were a trade secret?
4. Did the trial court err and abuse its discretion in overruling Central Trust's motion for reconsideration and for new trial because new evidence discovered after entry of summary judgment?

Point I: Summary Judgment as to Misappropriation of Trade Secrets

Standard of Review

Appellate review of a grant of summary judgment is de novo. ***Kinnaman-Carson v. Westport Ins. Corp.***, 283 S.W.3d 761, 764 (Mo. banc 2009). Summary judgment will be upheld on appeal if there is no genuine issue of material fact and movant is entitled to judgment as a matter of law. ***ITT Comm'l Finance Corp. v. Mid-America Marine Supply Corp.***, 854 S.W.2d

⁶ We note Central Trust's points relied on incorrectly identify the nature of the counts asserted in its First Amended Petition. For example, in its First Amended Petition, Count IV was for tortious interference with business relations and Count VII was for misappropriation of trade secrets. Yet, in its Point One it challenges the trial court's grant of summary judgment as to Count VI, which it states was for misappropriation of trade secrets, and in Point Two it challenges the trial court's grant of summary judgment as to Count VII, which it stated was for tortious interference with business relations. This discrepancy matters not to our resolution of this matter especially in that we find the first point relating to misappropriation of trade secrets to be dispositive.

371, 380 (Mo. banc 1993). When the moving party is the defendant, summary judgment can be established by showing one of the following:

(1) facts that negate *any one* of the claimant's elements facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of *any one* of the claimant's elements, or (3) that there is no genuine dispute as to the existence of *each* of the facts necessary to support the movant's properly-pleaded affirmative defense.

Id. at 381 (emphasis in original). Once the movant has made such a showing, the burden shifts to the non-movant to show that one or more of the material facts shown by the movant not to be in dispute, is actually genuinely disputed. *Crow v. Crawford & Co.*, 259 S.W.3d 104, 113 (Mo.App. E.D. 2008). "The non-movant may not rest upon the allegations and denials of the pleadings, but rather must use affidavits, depositions, answers to interrogatories, or admissions on file to show the existence of a genuine issue for trial." *Id.* "A genuine dispute is one that is real, not merely argumentative, frivolous, or imaginary." *Id.*

Under our standard of review, we review "the record in the light most favorable to the party against whom summary judgment was entered." *Kinnaman-Carson*, 283 S.W.3d at 764. "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.* (quoting *ITT Comm'l*, 854 S.W.2d at 376). Summary judgment is an extreme and drastic remedy and we exercise great caution in affirming it because the procedure cuts off the opposing party's day in court. *ITT Comm'l*, 854 S.W.2d at 377.

Analysis

A claim of misappropriation of trade secrets is governed by MUTSA, section 417.450, *et seq.*⁷ In order to establish a claim under MUTSA, a plaintiff must show: "(1) the existence of a

⁷ All statutory references are to RSMo 2000.

protectable trade secret, (2) misappropriation of those trade secrets by [the defendant], and (3) damages.” *Secure Energy, Inc. v. Coal Synthetics, LLC*, 708 F.Supp.2d 923, 926 (E.D. Mo. 2010).

While the threshold question is necessarily whether the information in the present matter can be considered a protected trade secret, the more important concern this Court faces is the issue of what specific information Central Trust is claiming as a trade secret. A review of both Central Trust’s amended petition, its statement of additional material facts, other responsive pleadings, and even its appellate brief reveals no precise definition for the repeatedly used terms “Client Database” and “Client Lists.” The amended petition asserts the “Client Database” “contains names, contact information, and personal and private information not available to the public of its clients and prospective clients,” as well as information relating to “client and potential client lists, personal and private information about clients and potential clients; specialized needs and preferences of clients and potential clients; client and prospective client contacts; marketing information; and the size and profitability of their clients’ accounts.” In its response to SignalPoint’s statements of uncontroverted fact, Central Trust took issue with the fact that “in August 2009, [Kennedy] took a cell phone containing the contacts and names of approximately 200 STC clients” and a “*list of his clients and relationships* at STC and put it in a safe deposit box.” (Emphasis added). It also refers throughout the amended petition and responsive pleadings to “STC’s customer list” with no further explanation as to what that encompassed. There are also vague assertions that Central Trust is somehow claiming that its relationships with its clients are a trade secret as well. Keeping in mind that “[e]vidence of purported ‘trade secrets’ must be . . . sufficiently specific to allow a determination by the court[.]” *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 611 (Mo. banc

2006), we shall address Central Trust’s basic assertion that its customer contact information⁸ is a trade secret that deserves protection under MUTSA.

A trade secret is defined as

information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 417.453(4). In determining whether information is to be considered a trade secret, the following factors are considered:

- (1) the extent to which the information is known outside of the holder’s business;
- (2) the extent to which it is known by employees and others involved in the holder’s business;
- (3) the extent of measures taken by the holder to guard the secrecy of the information;
- (4) the value of the information to the holder and to the holder’s competitors;
- (5) the amount of effort or money expended by the holder in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

State ex rel. Coffman Group, L.L.C. v. Sweeney, 219 S.W.3d 763, 769 (Mo.App. S.D. 2005).

“The existence of a trade secret is a conclusion of law based on the applicable facts.” *Lyn-Flex West, Inc. v. Dieckhaus*, 24 S.W.3d 693, 698 (Mo.App. E.D. 1999).

Client lists and databases are not specifically listed in the definition of “trade secret” found in section 417.453 and, under the facts in the record before us, the information at issue simply does not meet the statutory definition of a trade secret nor does it meet the six-factor test

⁸ “‘Customer contacts’ has been defined as ‘essentially the influence an employee acquires over his employer’s customers through personal contact.’” *Healthcare Services of the Ozarks*, 198 S.W.3d at 611 (quoting *Schmersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 349 (Mo.App. E.D. 2000)).

set out in case law. First, attached to Kennedy's employment contract was a list of his clients with no matching proviso that such information was to remain confidential in any way. Further, it was admitted by Central Trust that Kennedy could probably remember the names and personal information of each of his clients such that any type of written client list would be unnecessary for him to re-create his relationships. Second, Central Trust admits that it has—and does—share its client lists and their concomitant personal information with various affiliates such as local banks. Third, Central Trust and its predecessor, STC, admittedly allowed all employees to access the so-called Client Database without concern for the privacy of the potential client information contained therein and there was no assertion from Central Trust that these other employees were subject to any type of confidentiality or other privacy agreements. Fourth, prior to Kennedy's departure, it was admitted that previously three other employees left work with STC for other employ and either took lists of clients with them or actively solicited clients that had been with STC. None of those former employees were pursued legally. Fifth, despite assertions in its pleadings, Central Bank admitted that STC had, in fact, used some of its clients' names and likenesses in its marketing and advertising campaigns, including listing a variety of client names on its website. Sixth, Central Trust admits that technically each client has control of his or her own name and information such that its clients have the ability to cease doing business with Central Bank at any time to seek financial advice elsewhere. Seventh, while there was testimony the information at issue was "important," Central Trust has cited to no specific assertion in the record that the information at issue had any recognizable extrinsic or intrinsic value. It is clear that the "burden of proof rests upon [Central Trust] to substantiate its asserted interest in its trade secrets," *Healthcare Services of the Ozarks*, 198 S.W.3d at 611, and a review

of the record here shows Central Trust has failed to rebut the assertions of fact and law found in SignalPoint's motion for summary judgment.⁹

We are further persuaded by the recent case of *Western Blue Print Company, LLC v. Roberts*, 367 S.W.3d 7, 13-14 (Mo. banc 2012), in which the Supreme Court of Missouri addressed an issue similar to the one presented here in a matter involving claims of tortious interference with a business expectancy, civil conspiracy, and breach of fiduciary duty. In that case, a printing company manager left that employment and went to work for a competitor. *Id.* Her former employer then sued her when a large contract was lost to the competitor; the employer prevailed in court. *Id.* In analyzing the claim of breach of fiduciary duty that the employee had inappropriately contacted her former employer's customers and used other contact information to benefit her new employer, the court found that

‘in the sales industry the goodwill of a customer frequently attaches to the employer's sales representative personally; the employer's product becomes associated in the customer's mind with that representative.’ *While these ‘customer contacts’ are protectable, they are not protectable under a theory of confidential relationship or trade secret.* [The court in *Walter E. Zemitzsch, Inc. v. Harrison*, 712 S.W.2d 418, 421-22 (Mo.App. E.D. 1986)], acknowledged, “Because sales personnel may ‘exert a special influence over that customer and entice that customer's business away from the employer,’ the proper means of protection is a non-competition agreement.”

Western Blue Print Co., LLC, 367 S.W.3d at 18 (quoting *Zemitzsch*, at 712 S.W.2d at 421-22) (emphasis added) (internal citations omitted).

⁹ As an aside, we note that our review of the pleadings in this matter reveals the responsive pleadings filed by Central Trust fail to comply in numerous instances with the requirement of Rule 74.04(c)(2) that all denials be supported by appropriate citation to exhibits, affidavits, or other discovery documentation. A great deal of the time Central Trust's denials cite to a document or exhibit that does not contain the fact or assertion that is supposed to be found or supported there. Such facts that are not properly supported are deemed admitted. *Patrick v. Monte Owens Agency, Inc.*, 332 S.W.3d 917 (Mo.App. W.D. 2011). This hampers this Court's review and most likely played a role in the trial court's grant of summary judgment in favor of SignalPoint.

The court in *Western Blue*, was clear that a non-compete agreement is the proper means of preventing an employee who leaves employment from disseminating information relating to customer or client lists once the employee leaves employment. While Kennedy's employment contract with STC contained such a non-compete provision, that portion of the contract, per its terms, was "void and unenforceable in the event of a sale of [STC] or a sale of a controlling interest in [STC]." In fact, Central Trust admitted it was not relying on the employment contract for this remedy and that it was a "red herring" piece of evidence in the case.¹⁰ Accordingly, there was no non-compete provision in effect at the time Kennedy ended his employment with STC,¹¹ which was the same date the sale of STC to Central Trust was finalized, such that this Court fails to see how Central Trust could, as a matter of law, regulate Kennedy's use of the information he acquired during his tenure at STC.

Central Trust argues that *Whelan Security Co. v. Kennebrew & Morgan*, 379 S.W.3d 835 (Mo. banc 2012), holds that customer contacts and customer lists are protectable trade secrets. However, that conclusion is *dicta* found in a footnote. Further, we note that an ex-employee has a right to compete with a former employer if the employee has not entered into a valid covenant-not-to-compete agreement. See *Scanwell v. Freight Express St. Louis v. Chan*, 162 S.W.3d 477, 480 (Mo. banc 2005) (noting that the employee is free to compete with the employer after the employment relationship has ended in the absence of a restrictive agreement). In this case, because there was no valid employment agreement in place, no "proper means of

¹⁰ "Red Herring" is defined as "something that distracts attention from the real issue." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1042 (11th ed. 2005).

¹¹ We note Central Trust also asserts the Oath of Director signed by Kennedy created an obligation on his part for confidentially, as well as non-competition. While the spirit of the oath was in that vein, there is no assertion in the amended petition or in its responsive pleadings that SignalPoint even had knowledge of the oath prior to this lawsuit. This assertion by Central Trust fails.

protection” is available. *Western Blue*, 367 S.W.3d at 18. *Whelan Security* is simply not of assistance to Central Trust here.¹²

Even assuming *arguendo* that the information at issue could be considered to be a trade secret, Central Trust’s petition would still be subject to summary judgment based on its inability to assert a misappropriation of those trade secrets by SignalPoint. *Secure Energy*, 708 F.Supp.2d at 926. Central Trust’s petition merely states that SignalPoint “acquired Central Trust’s trade secrets and knew or had reason to know that the trade secrets were acquired by improper means.” There is no assertion as to how the trade secrets were acquired and, in fact, the petition is devoid, as is the record, of any assertion that there was any type of agency relationship between SignalPoint and Kennedy or any other relationship which would legally bind SignalPoint for Kennedy’s actions. This is especially true considering Kennedy left STC in November 2009, and did not associate with SignalPoint until February 2010. Further, Central Trust failed to assert in its responsive pleadings that SignalPoint ever had access or saw the client lists at issue and, in fact, stated in its brief: “There is no evidence SignalPoint asked Kennedy which clients were transferred from Central Trust.”

Based on the record before us, the customer contact information at issue is not considered to be a trade secret under Missouri law. Even if it were, it is clear that customer contacts are only protectable by a non-compete agreement and, in the present matter, Kennedy’s non-compete

¹² *Whelan Security* cites as authority for the proposition that customer lists are trade secrets, the decision of *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 18 (Mo. banc 1966). However, we question whether or not the Supreme Court specifically intended for a customer list itself to be a trade secret because the court in that decision discusses the definition of “trade secrets” found in the Restatement of Torts, § 757. Its discussion goes into a long definition that describes a formula, process, treatment, pattern, or other means of putting together tangible product. It also emphasizes that the subject matter of a trade secret must be “secret,” unlike the names of customers based upon the record before us.

agreement was voided by the sale of STC to Central Trust in November 2009. *Western Blue*, 367 S.W.3d at 18; *Zemitzsch*, 712 S.W.2d at 421-22. The trial court did not err in granting summary judgment in favor of SignalPoint because there were no genuine issues of material fact, SignalPoint properly negated elements of Central Trust's cause of action as to misappropriation of trade secrets, and Central Trust failed to establish there was a trade secret. Point I is denied.

Point II: Summary Judgment as to Interference with Business Relations

Point III: Summary Judgment as to Civil Conspiracy

In Points II and III, Central Trust takes issue with the grant of summary judgment on the claim of interference with business relations and the claim of civil conspiracy. Both of these causes of action hinge, as did Point I, on whether the customer contact information was a protected trade secret, the retention and use of which caused damage to Central Trust. Having found in Point I that such information is not a trade secret under statutory or case law as presented by this record, we need not address either Point II or Point III as our finding in Point I is also dispositive to these points. The trial court did not err in granting summary judgment in favor of SignalPoint because there were no genuine issues of material fact and SignalPoint properly negated elements of Central Trust's cause of action as to interference with business relations and civil conspiracy. Points II and III are denied.

Point IV: Motion for Reconsideration and New Trial

Standard of Review

We will not disturb a trial court's ruling on a motion for a new trial unless the trial court abused its discretion. *Bean v. Superior Bowen Asphalt Co., LLC*, 340 S.W.3d 275, 278 (Mo.App. W.D. 2011); *McCullough v. Commerce Bank*, 349 S.W.3d 389, 394 (Mo.App. W.D. 2011). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances before the court at the time and is so unreasonable and arbitrary that it shocks

one's sense of justice and indicates a lack of careful consideration. ***Kline v. City of Kansas City***, 334 S.W.3d 632, 638 (Mo.App. W.D. 2011). In ruling on new trial motions, the trial court is vested with substantial discretion over matters of fact. ***Damon Pursell Const. Co. v. Missouri Hwy. and Transp. Comm'n***, 192 S.W.3d 461, 469 (Mo.App. W.D. 2006).

Rule 78.01 provides:

The court may grant a new trial of any issue upon good cause shown. A new trial may be granted to all or any of the parties and on all or part of the issues after trial by jury, court or master. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact or make new findings, and direct the entry of a new judgment.

To prevail on a motion for a new trial based on newly discovered evidence, the party who seeks a new trial must show that (1) the evidence became known to the party since the trial; (2) the failure of the evidence to come to the party's knowledge sooner was not the result of a lack of due diligence; (3) the evidence is so material to the action that it would probably produce a different result if a new trial were granted; (4) the evidence is not merely cumulative; (5) the parties' affidavit should be produced or its absence accounted for; and (6) the object of the evidence is not meant to merely impeach the character or credibility of a witness. ***Damon Pursell Const***, 192 S.W.3d at 469. Motions for new trial "on the ground of newly discovered evidence 'are viewed with disfavor and courts grant them as an exception and refuse them as a rule.'" ***Pijanowski v. Pijanowski***, 272 S.W.3d 321, 324 (Mo.App. W.D. 2008) (quoting ***Williams v. McCoy***, 854 S.W.2d 545, 554 (Mo.App. S.D. 1993)).

Here, the trial court did not abuse its discretion in denying Central Trust's motion for new trial based on newly discovered evidence. In its pleadings and argument before the trial court, as well as in its appellate brief, Central Trust asserted that the newly discovered evidence at issue was the fact that in mid-2009, prior to his departure from STC, Kennedy placed a cell phone and

approximately 40 pages of client information into a safety deposit box. It maintained this evidence was improperly withheld by SignalPoint and Kennedy despite a great deal of discovery, and, had this evidence been available at the time of the summary judgment ruling, the outcome would have been different. The problem with this assertion is that in its response to SignalPoint's statement of uncontroverted facts, Central Trust admitted that "in August 2009, Kennedy took a cell phone containing the contacts and names of approximately 200 STC clients and put it in a safe" along with "a list of his clients and relationships at STC" In support of this fact, Central Trust cited to the deposition of Kennedy taken on May 10, 2011, in which he clearly disclosed his actions with the list and the cell phone. This deposition was taken on May 27, 2011, several weeks prior to the filing of SignalPoint's motion for summary judgment, and over a year prior to the amended judgment in this matter, which was filed on July 26, 2011. "An essential element to a motion for a new trial based on newly discovered evidence is that the evidence came to the knowledge of the party 'since the trial'" or the entry of the judgment.¹³ *Damon Pursell Const.*, 192 S.W.3d at 470 (quoting *Belden v. Chicago Title Ins. Co.*, 958 S.W.2d 54, 57 (Mo.App. E.D. 1997)). The record reveals that not only was there extensive discovery in this matter, but the evidence at issue was known to Central Trust over a year prior to trial. It cannot now claim such evidence was newly discovered since the entry of the judgment. The trial court did not abuse its discretion in denying Central Trust's motion on the basis of newly discovered evidence. Point IV is denied.

¹³ Although it is a criminal case, the reviewing court in *State v. Reed*, 971 S.W.2d 344, 349 (Mo.App. W.D. 1998), gave this explanation relating to newly discovered evidence:

Newly available evidence is not synonymous with newly discovered evidence for purpose of a new trial motion. Newly available evidence is evidence that existed at the time of trial and which the defendant was aware existed. Newly discovered evidence, in contrast, is evidence that the defendant was not aware existed until after the conclusion of the trial.

(Internal citations omitted).

The judgment of the trial court is affirmed.

WILLIAM W. FRANCIS, JR., J. - OPINION AUTHOR

GARY W. LYNCH, P.J. - CONCURS

NANCY STEFFEN RAHMEYER, J. - CONCURS