

*Duty Free Americas, Inc. v. Legg Mason Wood Walker*

In *Duty Free Americas, Inc. v. Legg Mason Wood Walker*, 2005 WL 914395 (Md. Cir. Ct.), the Court considered a motion by defendant Legg Mason Wood Walker (“Legg”) to dismiss several counts of an amended complaint filed by plaintiff Duty Free Americas, Inc. (“Duty”) alleging, among other things, conversion, breach of a confidential relationship and breach of contract.

Duty, a Maryland corporation, operated duty-free stores in U.S. airports and along the U.S., Canadian and Mexican borders. Legg, also a Maryland corporation with its principal office in Baltimore, provided financial services to the public. In mid 2001, Duty’s parent company began to explore the sale of Duty to a third party. Retained as Duty’s financial advisor, Sun Trust Robinson Humphrey prepared a confidential offering memorandum in order to assist potential buyers with evaluating Duty. The memorandum, which contained proprietary and confidential financial information about Duty, also contained provisions (i) restricting the use of the memorandum to potential purchasers of Duty in evaluating the corporation; and, among other things, (ii) requiring recipients of the memorandum to (a) acknowledge that the information contained therein was subject to a previously executed confidentiality agreement; (b) agree not reproduce the memorandum; and (c) agree to return the memorandum to Duty should the recipient choose not to purchase Duty. The memorandum was subsequently provided to a group of Duty’s officers and employees interested in purchasing the company, which group then retained Legg to assist them in their efforts to raise capital for the potential purchase. In that capacity, Legg was provided with a copy of the confidential memorandum. Late in 2001, Duty was sold to an unrelated party. Following the sale, Duty filed an action alleging that Legg used and disclosed confidential information obtained from the memorandum in an attempt to obtain work as a financial advisor to a group of bondholders.

Responding to Legg’s motion to dismiss certain counts of the complaint filed by Duty, the Court first addressed Legg’s argument that the Maryland Uniform Trade Secret Act (“MUTSA”) preempted Duty’s conversion claim. The Court acknowledged at the outset that the MUTSA preempted any other tort remedy involving trade secrets when it stated that, except as provided in subsection (b), §11-1207(a) displaces conflicting tort, restitutionary, and other law of Maryland providing civil remedies for misappropriation of a trade secret. (Md. Code. Ann., Com. Law. §11-1207(a) (Repl. Vol. 2005)). Duty attempted to argue that its conversion claim was not preempted because it was not “based upon misappropriation of a trade secret,” but rather that it was plead only to guard against the possibility that the Court found that the confidential memorandum and the information it contained were not trade secrets. However, since Duty’s conversion count did in fact allege conversion by Legg of Duty’s trade secrets and proprietary information, the Court held that the claim for conversion of trade secrets would be preempted by the MUTSA. The Court further held that, even without reference to trade secrets in the conversion count, the count had to be dismissed because there was no allegation within it that Legg exercised control over the confidential information contained in the memorandum to the exclusion of Duty. Citing *Yost v. Early*, 87 Md. App. 364, 388

(1991), the Court stated that conversion requires the exercise of dominion and control over the information to the complete exclusion of the rightful possessor. Because Duty had not alleged this required element of conversion, the Court dismissed that count of the complaint for failure to state a claim.

The Court next addressed Legg's requested dismissal of Duty's breach of confidential relationship claim. At the heart of Legg's motion for dismissal was its assertion that Duty's claim for breach of confidential relationship was essentially the same as a claim for breach of fiduciary duty, something not recognized as a tort in Maryland. In an attempt to support its claim, Duty cited to a number of Maryland cases that it asserted illustrated Maryland's recognition of claims for breach of confidential relationship. However, the Court summarily dismissed those cases, stating that none of them addressed the legal sufficiency of a breach of confidential relationship claim. Duty further attempted to argue that breach of a confidential relationship could exist not only in fiduciary relationships, but also in relationships such as principal and agent, partners and in buyer/seller relationships where a trade secret is disclosed in the course of confidential negotiations. It cited *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.*, 168 Cal. App. 3d. 455, 461-462 (1985), to support its perceived differences in the elements of breach of confidential relationship and breach of fiduciary duty. Citing to *Buxton v. Buxton*, 363 Md. 634, 654-655 (2001), for the premise that a "confidential relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interests in mind," the Court agreed that the *Tele-Count* holding was consistent with what the Maryland Court of Appeals has held is required for the existence of a confidential relationship. However, in dismissing this particular count, the Court stated that because Legg had gotten the memorandum from a third party, Duty had not alleged any facts showing an implied or actual relationship between Duty and Legg.

Finally, the Court dismissed Duty's claim against Legg for breach of contract. Citing to *Continental Masonry Co., v. Verdel Construction Co., Inc.*, 279 Md. 476, 480 (1977), the Court stated that a complaint for breach of contract must allege facts showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by the defendant. Although Duty argued that a contract between Duty and Legg formed when Legg obtained the confidential memorandum, the Court held that the language of the memorandum itself did not support that argument. The memorandum stated that recipients, by accepting it, agreed that all of the information contained therein was subject to a previously executed confidentiality agreement. Because Duty could not allege that Legg had previously executed a confidentiality agreement, or any other agreement, with Duty, and due to the fact that Legg was not even the recipient referred to in the memorandum, the Court found no contract that Legg could breach and accordingly dismissed that count of the complaint as well.