Interfysio, LLC v Co-Damm
2006 NY Slip Op 30728(U)
July 20, 2006
Supreme Court, New York County
Docket Number: 108204/2006
Judge: Richard B. Lowe III

b

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

----------x

INTERFYSIO, LLC,

Plaintiff,

Index No. 108204/2006

- against -

DECISION AND ORDER

CATHERINE MAY CO-DAMM,

Defendant.

----------x

RICHARD B. LOWE, III, J.:

Plaintiff InterFysio, LLC (InterFysio) moves for a preliminary injunction against defendant Catherine May Co-Damm (Co-Damm), temporarily restraining and preliminarily enjoining her from speaking about, discussing, revealing, communicating or otherwise disseminating any information regarding InterFysio. Co-Damm cross moves for an order dismissing the action for failure to state a cause of action, failure to comply with the Business Corporation Law (BCL) and the Limited Liability Company Law (LLCL), to direct the plaintiff to cease using the defendant's name and/or email address, and for reasonable fees and sanctions.

BACKGROUND

Plaintiff InterFysio is a New Jersey company not registered to do business in New York. With a place of business in New York, InterFysio is an employment placement service specializing in recruiting international physical therapists for employment in the United States and placing those physical therapist clients with customers. Defendant Co-Damm was employed by InterFysio on August 19, 2005, as a recruiter for InterFysio. On May 27, 2006, InterFysio alleges that it became aware that Co-Damm was soliciting business from clients and customers for her own endeavors. InterFysio alleges that Co-Damm referred one of InterFysio's recruits to a competitor and received

a fee. InterFysio also alleges that Co-Damm solicited a current employee of InterFysio to cease doing business with the plaintiff and to engage the defendant directly. Plaintiff commenced this action by filing a Summons and Complaint, dated June 8, 2006. In the Complaint, which the plaintiff avers that it is a New York corporation having the authority to conduct business in New York, InterFysio alleges three causes of action: breach of duty and tortious interference with a contractual relationship (first cause of action); a permanent injunction (second cause of action); and an accounting (third cause of action). After filing the Summons and Complaint, InterFysio, on June 15, 2006, terminated Co-Damm's employment. By Order to Show Cause dated June 16, 2006, the plaintiff moves for a preliminary injunction, seeking to enjoin Co-Damm from disseminating or using proprietary information about or on InterFysio.

Defendant Co-Damm, in response to this motion for a preliminary injunction, moves to dismiss this motion as well as to direct the plaintiff to stop using Co-Damm's name on its website, to delete and stop using the defendant's email address, and to award the defendant fees and sanctions. Co-Damm, a lawyer awaiting an interview with the Committee on Character and Fitness and admission to the New York Bar, had pre-existing contacts in the Philippines, when she came to work at InterFysio as an administrative assistant. Co-Damm alleges that she used these contacts in the Philippines to help InterFysio in its recruitment efforts. Co-Damm avers that, after she passed the New York Bar Examination, InterFysio asked her to sign a non-compete agreement, which she refused to do. Co-Damm also alleges that InterFysio's director threatened to send negative information to the Committee on Character and Fitness because she refused to sign the non-compete agreement. As well, Co-Damm alleges that InterFysio refused to compensate her for the work she performed while she was at InterFysio.

On June 26, 2006, Co-Damm answered the Complaint and, in turn, alleges nine counterclaims: failure to pay commissions pursuant to Labor Law § 190 (first counterclaim); failure to pay wages and commissions, damages, and for attorney's fees pursuant to Labor Law § 198 (second, third, and fourth counterclaims); violation of Civil Rights Law §§ 50 and 51 (fifth, sixth counterclaim); unjust enrichment (seventh counterclaim); violation of Penal Law § 250.25 for tampering with private communications (eighth counterclaim); and, an accounting (ninth counterclaim).

DISCUSSION

The plaintiff moves for a preliminary injunction restraining the defendant from disseminating any information regarding InterFysio, including its business operations, its principles, and its personnel, as well as to restrain the defendant from utilizing customer and client information obtained during her employment. The defendant cross moves to dismiss the Complaint as well as to order the plaintiff to cease using her name on the InterFysio website, her email address, and for sanctions for bringing this action against her. The court reviews the plaintiff's motion for a preliminary injunction prior to the defendant's motion to dismiss.

I. Preliminary Injunction

A party seeking a preliminary injunction pursuant to CPLR 6301 must show "(1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in [its] favor" (*J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 [1986]). The purpose of a motion for a preliminary injunction is to maintain the status quo until the merits of the case are heard and determined (*id.* at 402, quoting *Walker Memorial Baptist Church*

v Saunders, 285 NY 462, 474 [1941]; *see also Coinmach Corp. v Fordham Hill Owners Corp.*, 3 AD3d 312, 314 [1st Dept 2004]). However, because preliminary injunctions "determine the litigation and give the same relief which is expected to be obtained by the final judgment" (*Xerox Corp. v Neises*, 31 AD2d 195, 197 [1st Dept 1968], quoting 28 NY Jur, Injunctions § 19), a preliminary injunction will not be granted without "great caution and only when required by imperative, urgent, or grave necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile" (*id.*; *see also Chrysler Corp. v Fedders Corp.*, 63 AD2d 567, 568-69 [1st Dept 1978]).

The plaintiff argues that the defendant has not opposed this motion because the defendant submitted a cross motion to dismiss the Complaint instead of an opposition to the plaintiff's motion. This argument is frivolous at best. Even a cursory review of the defendant's memorandum of law in support of her motion to dismiss aptly demonstrates that the defendant is not only moving to dismiss the Complaint against her, but also to oppose the plaintiff's motion for a preliminary injunction (*see* Def Memo of Law). Indeed, her second argument specifically attacks the plaintiff's grounds for a preliminary injunction, averring that there is nothing secret about InterFysio's operations and business practices (*see id.*). Also, Co-Damm questions the lack of evidence as well as the validity of the evidence presented in support of the plaintiff's motion (*see id.*). It is obvious that the defendant opposes this motion. This argument blatantly fails.

In considering the actual application for a preliminary injunction, the motion must fail because the plaintiff has failed to demonstrate *any* of the requisites necessary for a court to issue the injunction. As to likelihood of success on the merits, while the plaintiff proclaims that the defendant solicited InterFysio's customers and utilized its trade secrets for personal gain, it has completely

failed to produce one piece of evidence to support its accusations. For instance, the plaintiff alleges that the defendant referred one of InterFysio's recruits to a competitor and received a fee for that referral. However, other than a bold and conclusory allegation made by InterFysio's president (*see* Assadi Aff ¶ 9), there is no evidence whatsoever to demonstrate that there was any referral. Indeed, InterFysio has not even provided the name of the recruit, let alone any indication of how Co-Damm solicited this individual or used InterFysio's trade secrets in her solicitation.

As well, the plaintiff claims that there were business secrets misappropriated to outsiders. Here, InterFysio provides a number of instant messenging conversations between Co-Damm and outside individuals, supposedly detailing these so-called business secrets (*see* Assadi Aff, Ex A). However, again, the plaintiff fails to show what, if anything, the defendant told these individuals were business secrets. For one, the defendant questions the legality of its usage. Even so, in reviewing these conversations, the court finds nothing so secretive or proprietary about the issues discussed by the defendant with outside individuals. The defendant communicates with outside individuals on topics ranging from the non-compete agreement, to Co-Damm's knowledge of the potential reduction in employee personal days, to a potential client's visa requirements. The court is bewildered by how any of these communications found in the conversations would be so proprietary that it would require this court to issue a preliminary injunction. Indeed, if the plaintiff is claiming that such information as salary and the number of holidays and/or personal days are trade secrets, then the plaintiff has utterly failed to demonstrate how this information constitutes business secrets (*see Ashland Management, Inc. v Janien*, 82 NY2d 395, 407 [1993]; *see also Mann v Cooper Tire Co.*, __ AD3d __, __, 2006 NY Slip Op 4335, *6 [1st Dept 2006] ["information cannot qualify for trade secret protection unless it is, in fact, secret"]).

Moreover, it is undisputed that the operations of InterFysio and the process of recruiting physical therapists is detailed on InterFysio's website (*see* Queller Aff, Ex C). The court finds nothing secretive about the processes in which InterFysio undertakes to recruit its candidates. Nor is such information regarding visas and immigration laws, also found on the website, a "trade secret" requiring an issuance of a preliminary injunction. Finally, the defendant claims that the customers whom InterFysio alleges is part of InterFysio's customer list are defendant's friends (*see* Co-Damm Aff). In response, the plaintiff suggests that "[t]o claim the names of the candidates were obtained by her sister, who knew them *all* as friends, is tenuous at best" (Pl Memo in Reply at 6 [emphasis in original]). Such a conclusory statement does not counter defendant's argument that many of the people she had helped to solicit were all people she knew before she entered the company. In summary, the plaintiff has utterly failed to demonstrate likelihood of success on the merits.

As to irreparable harm, the plaintiff has failed to demonstrate how the plaintiff would be harmed, if at all, given that the plaintiff has not provided any evidence of what InterFysio believes is a trade secret or proprietary business practice. Nor has the plaintiff provided any indication of how Co-Damm would seek to use this information to harm the plaintiff, considering that she is planning to work in the legal sector and not in the physical therapy area (*see* July 17, 2006 Minutes). Finally, it is obvious to this court that, in balancing the equities, the defendant would be more harmed than the plaintiff because of the purported restraint on the defendant, especially considering that the plaintiff has failed to demonstrate likelihood of success on the merits.

For the reasons articulated, the plaintiff's motion for a preliminary injunction is denied.

II. Motion to Dismiss

In a motion to dismiss pursuant to CPLR 3211 (a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]).

A. Authority to Maintain Action

The defendant makes a number of arguments in support of her motion to dismiss. First, the defendant argues that, pursuant to BCL § 1312 and LLCL § 808, the plaintiff lacks the ability to maintain this action in New York because the plaintiff is a New Jersey limited liability company and is not registered or authorized to do business in New York. While the plaintiff concedes that it is not registered to do business in New York (*see* July 17, 2006 Minutes), InterFysio counters with the argument that it has authority to bring this action pursuant to CPLR 302, since its claims are based on injuries occurring as a result of actions taking place in this state (*see* Pl Memo in Reply). The plaintiff not only misconstrues CPLR 302, but nonsensically misapplies this section in its motion.

CPLR 302 is otherwise known by its more familiar title: New York's long-arm statute. Its purpose, as any attorney who has taken Civil Procedure knows, is to extend the jurisdiction of the courts of the state to nonresident *defendants* who engage in some purposeful activity in the state (*Ferrante Equipment Co. v Lasker-Goldman Corp.*, 26 NY2d 280, 284 [1970]; *Hurlbut v Hurlbut*, 101 Misc 2d 571, 573 [Sup Ct, Nassau County 1979]; *see also* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C302:3). Indeed, the purpose of any long-arm statute is to extend the jurisdictional basis of a court sitting in that state to a non-resident defendant who, having committed a harm within the state, would otherwise be immune to the court's jurisdiction and laws of that state. Here, what the plaintiff fails to appreciate is that it is not the

defendant's burden to demonstrate that she is not subject to the laws of New York. Instead, the onus is on the plaintiff to show that it has the ability and right to commence this action, or any action, in a New York court.

Nonetheless, the plaintiff still contends that it need not abide by the BCL or LLCL because its injuries in New York allow it to bring such claims. It is obvious that the court disagrees. Here, contrary to InterFysio's arguments, both BCL § 1312 and LLCL § 808 do apply in this instance. BCL § 1312 specifies that a "foreign corporation doing business in this state without authority shall not maintain any action . . . unless and until such corporation has been authorized to do business in this state." As well, LLCL § 808 provides that a:

> foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state.

Here, the plaintiff is not registered to do business in New York either as a corporation or as a limited liability company. Further, there is no indication that InterFysio has filed for authority or would do so. Indeed, InterFysio continues to do business in New York, even without authorization. Here, not only is a preliminary injunction unwarranted, but the Complaint must be dismissed.

The court does note that the plaintiff is an employment agency within the meaning of General Business Law (GBL) § 171 (b). Pursuant to GBL § 172, "[n]o person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefor as provided in this article. Such license shall be issued by the commissioner of labor," except in the City of New York, where the commissioner of consumer affairs issues such licenses. There is no dispute, nor can there be any, that the plaintiff is required to acquire a license

from the commissioner of consumer affairs to carry on this business in New York. However, the court is confounded by how the plaintiff may legally operate this employment agency, especially where it is not authorized to business in New York. Nor does the plaintiff provide any evidence to argue to the contrary. The court recommends that this portion of this matter be referred to the City of New York commissioner of consumer affairs pursuant to GBL § 189 for enforcement of New York's licensing requirements.

B. The Complaint

Even if the court were to disregard the status of the company and liberally and expansively read the Complaint as required under CPLR 3026, the Complaint fails to comply with the simple requisites of CPLR 3013. CPLR 3013 requires that:

> [s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transaction, occurrence, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

It is well-established that a pleading, even if "inartfully drawn, should not be dismissed, so long as it sets forth a cause of action" (*McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990], citing *Kraft v Sheridan*, 134 AD2d 217, 218-19 [1st Dept 1987]). However, even in liberally reading and construing this Complaint for the non-movant, the plaintiff has completely failed to provide any "sufficiently particular" statement that would give notice to the court of the transactions or occurrences the plaintiff alleges Co-Damm has done to harm the plaintiff. While it "is enough now that a pleader state the facts making out a cause of action" (*see Diemer v Diemer*, 8 NY2d 206, 212 [1960]), here, there are *no* facts whatsoever supporting any cognizable cause of action. Other than conclusory allegations that the defendant utilized business secrets and solicited

the plaintiff's clients, the typical questions of who, what, when, where, why, and how have not been answered in any manner, shape, or form by this Complaint.

Accordingly, the motion to dismiss the Complaint is granted.

C. Defendant's Counterclaims

The court next addresses the defendant's concerns regarding the use of her name on the InterFysio website as well as her email address. Here, the defendant is no longer employed by the plaintiff. Nor is there is any dispute that her employment was terminated on June 15, 2006. That she is no longer employed by InterFysio, her name should be removed from the website. While the court takes no stand as to whether there is a violation of the Civil Rights law, the continuous use of her name may indeed be a violation thereof. Accordingly, the court directs that InterFysio remove Co-Damm's name from the website. As well, InterFysio is prohibited from utilizing the email address Co-Damm used while at InterFysio.

D. Sanctions

Finally, the defendant moves the court to award the defendant reasonable attorney's fees and costs for defending this motion and having to bring this cross-motion. The court may, in its discretion, impose sanctions pursuant to 22 NYCRR § 130-1.1 (c) for frivolous conduct, if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.

(*Id.*).

As well:

> In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

(*Id.*).

In reviewing the Complaint, the court finds that the plaintiff clearly misinformed the court regarding its corporate status. Pursuant to CPLR 3015 (b), "the complaint shall . . . specify the state, country or government by or under whose laws the party was created." Here, the plaintiff articulates in its Complaint that it is "*a corporation existing under the laws of the State of New York and [is] authorized to conduct business in the State of New York*" (Complaint ¶ 1 [emphasis added]). This is a blatant misrepresentation to the court. For one, the plaintiff conceded during oral argument that it is not authorized to do business in New York (*see* July 17, 2006 Minutes). Furthermore, the plaintiff, knowing that it lacked any authority to do business in New York, did not even suggest that it was applying for or was in the process of obtaining such authority to conduct its business (*id.*). InterFysio even continues to do business in New York, notwithstanding the fact that it is not authorized to do so. Indeed, not only does the plaintiff lack standing to bring an action in this jurisdiction, but the plaintiff, as well as its attorneys, have clearly misled this court.

The court finds that the plaintiff has seriously breached the Judiciary Law by bringing this completely meritless Complaint, warranting the imposition of sanctions. For one, the plaintiff manifestly misrepresented to this court its authority to do business in New York. As well, when the defendant pointed out that it was not authorized to do business in New York by her cross-motion, the plaintiff failed to do anything to resolve that issue. In addition, the plaintiff had more than

enough time, since the parties stipulated to adjourn this hearing once before (*see* Stipulation), to conduct further investigations into the legal and factual bases for its Complaint, to garner more evidence, and to determine whether or not this litigation could readily be supported. However, not only did the plaintiff fail to do so, but, knowing that the plaintiff lacked both the authority to bring this action as well as evidence in support of its motion for a preliminary injunction, nonetheless continued its course of conduct and pursued arguments completely without merit (*accord Yenom Corp. v 155 Wooster St., Inc.*, __ AD3d __, 2006 NY Slip Op 5732 [1st Dept 2006]).

More significantly is the issue of harassment and injury to the defendant. The court notes that the plaintiff alleges that it first discovered that Co-Damm was using confidential business information to solicit business for her own endeavors and providing such secret information to outsiders on May 27, 2006 (*see* Complaint). Instead of terminating her employment immediately, however, the plaintiff emailed the defendant on June 6, 2006, to warn her not to tell anybody about the company's anticipated reduction of personal days, apparently considering this information to be proprietary (*see* Assadi Aff). The court sees no reason for this email if not to provide for a paper trial for her termination and for the basis of this motion. This is especially the case where the communications in which the defendant purported to disseminate confidential InterFysio information are all dated prior to June 2, 2006, and the plaintiff knew about this alleged dissemination since May 27, 2006 (*see id.*).

The plaintiff then brought this Complaint against the defendant on June 8, 2006 (*see* Complaint). However, it was not until after the filing of the Complaint that the defendant was terminated on June 15, 2006 and the Order to Show Cause was brought before this court on June 16, 2006. These dates only demonstrate a pattern of conduct the plaintiff undertook to harass Co-Damm

for her failure to sign the non-compete agreement. As well, these dates reasonably explain the malicious injury allegations the defendant makes when she avers that the plaintiff would provide negative information to the Committee on Character and Fitness. While the plaintiff denies these allegations during oral argument (*see* July 17, 2006 Minutes), it is telling that no affidavit has been provided to rebut such claims.

For the reasons set forth above, the court grants the motion to dismiss, grants the motion to remove the defendant's name from the website, grants the motion to enjoin the plaintiff from utilizing the defendant's name and/or email, and grants the motion for sanctions pursuant to 22 NYCRR § 130-1.1 (a) and Section 130-1.2, sanctioning the plaintiff for defendant's attorney's fees and costs for responding and defending this motion. Furthermore, for the blatant misrepresentations made to the court, this court, pursuant to 22 NYCRR § 130-1.2, sanctions both the plaintiff's attorneys as well as the plaintiff[1] in the amount of $5,000.00 each.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff InterFysio, LLC's motion for a preliminary injunction is denied; it is further

ORDERED that defendant Catherine May Co-Damm's motion to dismiss is granted and the Complaint is dismissed in its entirety, with costs and disbursements to the defendant as taxed by the clerk of the court; it is further

---

[1] The court points out that the Director of InterFysio, John Assadi, Esq., is an attorney himself and, as such, is plainly aware of the frivolity of this action.

ORDERED that the plaintiff shall remove Co-Damm's name from the InterFysio website and shall be prohibited and enjoined from utilizing her email address at InterFysio; it is further

ORDERED that the firm of Grotta, Glassman & Hoffman, P.C., attorneys for the plaintiff, shall be sanctioned pursuant to 22 NYCRR § 130.1-1 and section 130.1-2 in the amount of $5000.00, to be made payable to the Lawyers' Fund for Client Protection; it is further

ORDERED that the plaintiff shall be sanctioned pursuant to 22 NYCRR § 130.1-1 in the amount of $5000.00, to be deposited with the clerk of the court for transmittal to the Commissioner of Taxation and Finance in accordance with 22 NYCRR § 130.1-2; it is further

ORDERED that the plaintiff shall be sanctioned pursuant to 22 NYCRR § 130-1.1 for defendant's attorney's fees and costs; it is further

ORDERED that the that the issue of attorney's fees and costs is severed and is referred to a Special Referee to hear and determine; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the clerk of the Judicial Support Office to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the plaintiff shall serve a response to Co-Damm's Answer and Counterclaims within ten days of notice of entry.

THIS CONSTITUTES THE ORDER AND DECISION OF THE COURT.

Dated: July 20, 2006

ENTER:

RICHARD B. LOWE, III, J.S.C.

RICHARD B. LOWE III