

**Recovery Racing III, LLC v Tambini**

2012 NY Slip Op 31329(U)

April 24, 2012

Supreme Court, Nassau County

Docket Number: 014648/11

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

TRIAL/IAS PART 14

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RECOVERY RACING III, LLC D/B/A  
FERRARI-MASERATI OF LONG ISLAND,

Plaintiffs,

Index No.: 014648/11  
Motion Sequence...01  
Motion Date...03/09/12

-against-

JOSEPH J. TAMBINI,

Defendant.

\_\_\_\_\_  
Papers Submitted:  
Notice of Motion.....X  
Memorandum of Law.....X  
Affirmation in Opposition.....X  
Memorandum of Law.....X  
Reply Memorandum of Law.....X

Upon the foregoing papers, the motion by the Defendant, Joseph J. Tambini, seeking an Order, pursuant to CPLR § 3211 (a) (7), dismissing Plaintiff’s complaint for failure to state a cause of action is determined as hereinafter provided.

Insofar as a motion made pursuant to CPLR § 3211 (a) (7) requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]), the underlying facts are as follows:

The Defendant, Joseph Tambini (hereinafter “Tambini”), was employed by the

Plaintiff, Recovery Racing III, LLC D/B/A Ferrari Maserati of Long Island (hereinafter “Ferrari”) from December 15, 2008 until September 7, 2011. The Defendant, Tambini’s job title was “Parts Manager,” the responsibilities of which Ferrari described as liaison to Ferrari’s wholesale equipment and parts purchasers.

During this period, on or about November 2, 2010, Tambini was given an employment handbook containing employment practices, procedures and rules pertaining to employee conduct. Pages 72 and 73 of this employment handbook, entitled “Acknowledgment”, seeks assent from the employee to a summary of the pertinent parts of the handbook. The acknowledgment leaves two spaces for the employee to sign and date the document. Of note is a bolded sentence in the acknowledgment regarding Ferrari’s proprietary information, solicitation of customers, non-competition, and reimbursement of training expenses under “certain circumstances.”

The employee handbook imposes several rules on employees after their termination of employment. Employees are prohibited from soliciting or accepting business from any customers of Ferrari for eighteen months following the expiration of employment. Employees are prohibited from selling, leasing or servicing any new Ferrari or Maserati vehicles for eighteen months within two hundred miles of Ferrari’s location. Employees are prohibited from inducing any customer of Ferrari to patronize any entity which is in the business of selling or servicing Ferrari or Maserati vehicles through the use of records or data to which they had access during employment. Former employees may not use, disclose,

reproduce or retain any of Ferrari's proprietary information or Confidential Customer Information after employment expires.

The Defendant, Tambini resigned from Ferrari on or about August 24, 2011, and subsequently began working as "Parts Manager" of Miller Motorcars in Greenwich, Connecticut. Miller Motorcars sells and services Ferrari and Maserati vehicles. Miller Motorcars has a principal place of business in Greenwich and a satellite outlet in Roslyn, New York, which are approximately forty-five miles away and ten miles away from Ferrari's location, respectively.

The Plaintiff has pled three causes of action: (1) breach of contract; (2) unfair competition; and (3) breach of fiduciary duty. The Plaintiff claims that the Defendant physically took, misappropriated, recorded and/or memorized Confidential Customer Information and other proprietary information from Ferrari's computer and customer files. The Plaintiff additionally claims that their services, contacts, knowledge of the marketplace, and historical customer information constitute trade secrets. The Plaintiff asserts that if the Defendant were to use this information to divert the Plaintiff's customers and other business to the Defendant's new employer, the Plaintiff will suffer irreparable harm.

The Defendant moves to dismiss all three causes of action under CPLR § 3211 (a) (7). The Defendant argues that, since the employment handbook does not constitute a valid contract, no action for breach of contract can be maintained. Also, the Defendant states that there is no allegation by the Plaintiff that the Defendant, Tambini used any of Ferrari's

confidential information or trade secrets at Tambini's new employment. Finally, the Defendant contends that, not having used any of Ferrari's confidential information or trade secrets, he cannot be said to have breached any fiduciary duty to Ferrari.

The Defendant claims to have never assented to the terms of the November 2, 2010 employee handbook. Additionally, the Defendant claims to have received no consideration for agreeing to additional terms of employment, and therefore no valid contract exists pertaining to the employee handbook.

When a party moves to dismiss a complaint pursuant to CPLR § 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Trotta v. Ollivier*, 91 A.D.3d 8 [2<sup>nd</sup> Dept. 2011]; *Foley v. D'Agostino*, 21 A.D.2d 60 [1<sup>st</sup> Dept. 1964]). In considering a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court should accept the facts as alleged in the complaint as true, accord Plaintiffs the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory (*Trotta*, supra; *Vitarelle v. Vitarelle*, 65 A.D.3d 1034 [2<sup>nd</sup> Dept. 2009]).

The Defendant's argument as to the Plaintiffs first cause of action, breach of contract, is misplaced. The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the Plaintiff's performance under the contract, (3) the Defendant's breach of that contract, and (4) resulting damages (*Palmetto Partners, L.P. v. AJW Qualified Partners*, 83 A.D.3d 804 [2<sup>nd</sup> Dept. 2011]; see also *JP Morgan Chase*

*v. J.H Elec. Of New York, Inc.*, 69 A.D.3d 802 [2<sup>nd</sup> Dept. 2010]). The Defendant's claim that no valid contract existed is irrelevant as to whether the Plaintiff alleged sufficient claims in it's pleadings to constitute each element of a cause of action for breach of contract. Here, the Plaintiff, Ferrari, alleged that a binding agreement existed, which the Plaintiff, Ferrari, performed and the Defendant, Tambini, breached, resulting in damages in "no less than \$100,000.00." Clearly, all four elements of the "breach of contract" cause of action have been sufficiently pled by the Plaintiff.

The Plaintiff's second cause of action is for unfair competition. A cause of action based on unfair competition may be predicated upon the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets (*MidAmerica Productions, Inc. v. Derke*, 2010 WL 7765577 [N.Y.Sup. 2010]; *Out of Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575 [2<sup>nd</sup> Dept. 2008]). In the instant matter, the Plaintiff, Ferrari, has alleged the Defendant, Tambini's bad faith misappropriation of Ferrari's confidential information, and has further outlined specifically what types of information they deem to be proprietary information and/or trade secrets. A cognizable legal theory for unfair competition is apparent from the pleadings.

Finally, the Plaintiff's third cause of action is for breach of a fiduciary duty. In order to establish a breach of fiduciary duty, there must be (1) a fiduciary relationship, (2) misconduct by the Defendant, and (3) resulting damages (*Kurtzman v. Bergstol*, 40 A.D.3d

588 [2<sup>nd</sup> Dept. 2007]); *Daughters of Mary Mother of Our Savior v. LaSalle*, 32 Misc.3d 1247(A) [N.Y.Sup. 2011]). Here, again, the Plaintiff, Ferrari, has clearly alleged sufficient facts to constitute a cognizable legal theory. The Plaintiff, Ferrari, alleged that the Defendant, Tambini, owed a fiduciary duty to Ferrari regarding his access to Ferrari's confidential customer information. The Plaintiff, Ferrari, further alleged that the Defendant, Tambini, breached this fiduciary duty by using Ferrari's proprietary, confidential information to divert Ferrari's business to his new employer. Finally, Ferrari alleged that Tambini's misconduct caused damages to Ferrari.

Accordingly, it is hereby

**ORDERED**, that the motion by the Defendant seeking to dismiss the Plaintiff's complaint for failure to state a cause of action is **DENIED**; and it is further

**ORDERED**, that the parties appearing in this action are hereby directed to appear for a Preliminary Conference in this matter, which shall be held on **May 10, 2012 at 9:30 a.m.** at the courthouse lower level

This shall constitute the Decision and Order of this Court.

DATED: Mineola, New York  
April 24, 2012

  
\_\_\_\_\_  
Hon. Randy Sue Marber, J.S.C.

**ENTERED**

APR 27 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE