

Douglas Elliman LLC v Steinberg
2017 NY Slip Op 31047(U)
May 16, 2017
Supreme Court, New York County
Docket Number: 655479/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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DOUGLAS ELLIMAN LLC, d/b/a DOUGLAS
ELLIMAN REAL ESTATE,

Plaintiff,

-against-

LEONARD STEINBERG, HERVÉ SENEQUIER,
and URBAN COMPASS INC.,

Defendants.
-----X

**DECISION AND
ORDER**

Index No.
655479/2016
Mot. Seq. 001

HON. ANIL C. SINGH, J.:

Defendants Leonard Steinberg (“Steinberg”), Herve Senequier (“Senequier”) and Urban Compass Inc. (“Compass”) (collectively, “defendants”) move to dismiss plaintiff Douglas Elliman Inc.’s (“Douglas Elliman”) complaint for failure to state a cause action. In the alternative, defendants ask that this case be consolidated with a related case¹. Plaintiff opposes.

From November 2001 to June 2004, defendants Steinberg and Senequier were affiliated, as independent contractors, with Douglas Elliman LLC. On June 3, 2014, the individual defendants terminated their relationship with Douglas Elliman to join defendant Compass, a real estate start-up that launched in 2013.

¹ LuxuryLoft, Inc. v. Douglas Elliman Realty, LLC, No. 655264/2016 (the “related case”)

Over seventeenth months later, the individual defendants and Douglas Elliman entered into the Commission Confirmation Agreement (the "Agreement"), dated November 18, 2015. The Agreement reaffirmed Douglas Elliman's existing obligation to pay Steinberg and Senequier 100% of the commissions owed to them from transactions they had brokered while at Douglas Elliman. (Agreement at ¶ 1). The Agreement also required Douglas Elliman to pay the individual defendants \$200,000 in consulting payments. *Id.* at ¶ 3. Additionally, Steinberg and Senequier agreed not to solicit Douglas Elliman agents or assist in the solicitation of Douglas Elliman's personnel. The Agreement did not restrict Steinberg and Senequier in any manner, provided the agents first initiated contact with them.

Douglas Elliman commenced this action in October 2016. It alleges that Steinberg and Senequier with the aid of Compass improperly induced a number of additional agents to leave Douglas Elliman and join Compass. Additionally, the individual defendants allegedly induced property owners with exclusive contracts with Douglas Elliman to breach those contracts. Douglas Elliman states that defendants breached the non-solicitation provision of the Agreement, tortiously interfering with the Agreement, tortiously interfering with Douglas Elliman's exclusive agreements with the property owners and engaging in unfair competition.

Prior to the commencement of this lawsuit, Steinberg and Senequier filed suit against Douglas Elliman for allegedly failing to pay them the agreed-upon

commissions under the Agreement. There is no opposition to consolidate the two actions.

Discussion

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, if, from the pleadings four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law.” 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration. Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

Enforceability of the non-solicit provision

Steinberg and Senequier argue that the non-solicit is unreasonable and accordingly, unenforceable. The non-solicitation provides in relevant part that:

Steinberg and Senequier, each, covenant and agree that for a period commencing on [November 18, 2015] and ending on the eighteen (18) month anniversary hereof, they will neither, (i) directly or in association with others, solicit or in any manner encourage any current employee, independent contractor, broker or salesperson of DE (or any of its affiliates) to leave DE (or any of its affiliates), for the employ or association of Compass (or any of its affiliates), nor (ii) assist others, in doing the acts set forth in (i) above. Notwithstanding anything in this Section 5 or this Agreement to the contrary, in no event shall Steinberg and/or Senequier be restricted, in any manner, from engaging in any of the activities set forth in this Section 5 where any individual(s) first initiate communications with either or both of Steinberg and/or Senequier.

In New York, a restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. A violation of any prong renders the covenant invalid. BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 388-89 (1999). Moreover, the courts have limited an employer interests under the first prong of the common-law rule to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary. Reed, Roberts Associates, Inc. v. Strauman, 40 N.Y.2d 303, 308 (1976).

Here, the non-solicit clause is reasonable. Taking the allegations in the complaint - as the court must on a motion to dismiss - to be true, Douglas Elliman has a legitimate interest in protecting its customer relationships and the goodwill

created and maintained at its own expense. Additionally, Douglas Elliman's agents are privy to valuable and substantial proprietary information, including new developments in the initial planning stages and confidential business strategies for those new developments created by Douglas Elliman.

Defendants relying upon Shmueli v. NRT New York, Inc., 68 A.D. 3d 479 (1st Dept 2009) argue that the customer relationships at issue do not belong to Douglas Elliman, but to its agents, including Steinberg and Senequier. Shmueli is distinguishable as the defendant, a brokerage firm, converted the agent's customer list. At issue here is the validity of a non-solicitation provision. Furthermore, Shmueli was decided after trial and does not explicitly hold that as a matter of law all customer contacts and information are the property of the agent and not the brokerage firm. Douglas Elliman's allegations at this stage of the proceeding are sufficient to survive a motion to dismiss.

The non-solicit is narrowly tailored - Steinberg and Senequier are allowed to work for Compass, to solicit any client or potential client, and even to hire any Douglas Elliman's broker or agent that approaches them independently. The restriction is limited to the solicitation of Douglas Elliman's brokers and agents for 18 months from the time the Commission Agreement was signed. This period is a reasonable time for a non-solicit covenant. See e.g., OTG Mgt., LLC v Konstantinidis, 40 Misc 3d 617, 622 (Sup. Ct. NY Cnty 2013) (where the court held

that a 2-year non-recruitment covenant is reasonable); First Manhattan Consulting Group v. Novantas, Inc. et. al., 2015 WL 3883082, at *4 (denying motion to dismiss breach of non-recruitment provision that prohibited plaintiff for two years from "directly, or indirectly, solicit[ing] or counsel[ing] ... an FMCG employee ... to terminate that employment or to become affiliated . . . with any other employer or organization").

The provision even allows individual(s) to first initiate communications with either or both of Steinberg and/or Senequier. Although there is no geographic restriction, defendant's claim that the non-solicit is a "worldwide restrictive covenant" is an exaggeration. A review of Douglas Elliman's public website indicates that it has offices in one country (the United States) and six states. Moreover, in New York, the courts have "expressly recognized and applied the judicial power to sever and grant partial enforcement for an overbroad employee restrictive covenant." Brown & Brown, Inc. v. Johnson, 25 N.Y.3d 364, 371 (2015).

Even if the restrictive covenant is found to be unenforceable, an exception to the general rule that non-compete provisions are disfavored may apply here. Under the employee choice doctrine where an employee voluntarily resigns and the "employer conditions receipt of post-employment benefits upon compliance with a restrictive covenant" the restriction will be enforced "without regard to

reasonableness.” Morris v. Schroder Capital Management Intern., 7 N.Y.3d 616, 620–21 (2006).

Here, after Steinberg and Senequier resigned, Douglas Elliman agreed to make substantial payments to them conditioned upon a post-termination non-solicit provision. Steinberg and Senequier had a choice not to accept the payment and solicit Douglas Elliman’s agents. Their decision to accept payments may result in the non-solicitation agreement being enforceable. See e.g., Lenel Systems Intern., Inc. v. Smith, 106 A.D.3d 1536, 1539–40 (4th Dept 2013).

Breach of Contract as against Steinberg and Senequier (First Cause of Action)

Assuming the enforceability of the non-solicit, the breach of contract claim fails on the grounds that the complaint does not adequately allege that defendants Steinberg and Senequier made solicitations to anyone in violation of the non-solicit. Douglas Elliman’s allegations are conclusory. In its complaint, Douglas Elliman alleges that defendants Steinberg and Senequier targeted “every member of the 17th Street Office, from agents to secretaries.” Douglas Elliman contends that before Steinberg and Senequier were appointed as Compass’ president and vice president of Strategic Development, turnover was uncommon in Douglas Elliman’s 17th Street office. However, allegedly after Steinberg and Senequier left for Compass, there was a dramatic rate of turnover and the two received recruiting bonuses for each agent who left.

These conclusory allegations are insufficient to satisfy the minimal pleading standards for breach of contract. See e.g., Epic Sports Int'l, Inc. v. Frost, 2013 WL 705527, at *4-5 (Sup Ct, NY Cnty Feb 21, 2014); Jones Grp. Inc. v. Zamarra, 2014 WL 2472102, at *5 (Sup Ct, NY Cnty Apr 9, 2014). The allegations lack an evidentiary detail such as a phone call or electronic communication between the defendants and any agents.

Therefore, defendants' motion to dismiss the breach of contract claim as to Steinberg and Senequier is granted with leave to replead.

Tortious Interference with the Commission Confirmation Agreement as against Urban Compass Inc. (Second Cause of Action)

To state a claim for tortious interference with contract, a plaintiff must plead "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 424 (1996).

Here, since Douglas Elliman has failed to adequately plead that Steinberg or Senequier breached the Agreement, Compass could not have induced the breach.

Nor has Douglas Elliman adequately pled that Compass intentionally procured Steinberg and Senequier to breach of the Agreement. Douglas Elliman's allegation that Compass "hired a recruiter to work in connection with Steinberg and

Senequier to contract every Douglas Elliman agent at the 17th Street office” is conclusory. (Complaint ¶ 36). Compass had the legal right to hire a recruiter to solicit Douglas Elliman’s agents, as it was not subject to the restrictive covenant. Compass was allowed to provide the recruiter with financial incentives in the form of recruiting bonuses for each agent lured away from Douglas Elliman. The role of Steinberg and Senequier in these alleged recruitment is conclusory.

Therefore, defendants’ motion to dismiss the tortious interference claim as to the Commission Agreement as against Compass is granted with leave to replead.

Tortious Interference with any Douglas Elliman Exclusive Agreements as against Urban Compass Inc. (Third Cause of Action)

Douglas Elliman has adequately pled that there were at least 11 Exclusive Agreements at issue and identified the exclusivity provisions.

The complaint also sufficiently pleads Compass’ knowledge of the Exclusive Properties by alleging that Compass targeted specifically identified Douglas Elliman agents based on knowledge that they handled Exclusive Properties. The complaint also alleges that Compass directed the recruited Douglas Elliman agents to induce the Exclusive Properties’ owners to breach the Exclusive Agreements and even instructed those agents on methods for evading the exclusivity obligations under the agreements.

Moreover, plaintiff has also sufficiently alleged that Compass caused the Exclusive Property owners to breach the Exclusivity Provision of the Exclusive

Agreements by continuing to show the properties and by entering into new exclusive agreements with Compass. Indeed, Compass allegedly continues to actively list the Exclusive Properties on its website in order to sell them, allegedly depriving Douglas Elliman of the full sales commission and causing Douglas Elliman damage.

Therefore, defendants' motion to dismiss the tortious interference claim as to the Exclusive Agreements as against Compass is denied.

Unfair Competition (Fourth Cause of Action)

“[A]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property.” ITC Ltd. v Punchgini, Inc., 9 NY3d 467, 478 (2007) (internal quotation marks omitted). “To state such a claim, a plaintiff must demonstrate that it had compiled information used in its business that provided an opportunity to obtain a competitive advantage and that a competitor misappropriated it.” Edelman v Starwood Capital Group, LLC, 2008 WL 2713489, 2008 NY Misc LEXIS 9980, *5 (Sup Ct, NY County, June 27, 2008, Index No. 0601077/2007), affd 70 AD3d 246 (1st Dept 2009). “[T]he mere inducement of an at-will employee to join a competitor [is not] actionable, unless dishonest means are employed, or the solicitation is part of a scheme designed solely to produce damage.” Headquarters Buick-Nissan v Michael Oldsmobile, 149 AD2d 302, 304 (1st Dept 1989). See also,

First Manhattan Consulting Group, LLC v. Novantas, Inc., 2015 WL 3883082, at *7-8 (Sup Ct N.Y. Ctny June 23, 2015)

The complaint states an unfair competition claim based on Compass' alleged misappropriation of Douglas Elliman's 2016 Wealth Report. See e.g., CBS Corp. v. Dumsday, 268 A.D.2d 350, 352–53 (1st Dept 2000) (complaint stated claims for misappropriation and unfair competition, where “the scenario set forth by plaintiff,” that the defendants resigned, started a competing business and replaced defendant on a pending project with one of plaintiff's clients, “permit[ed] an inference that defendants improperly used trade secrets in an effort to supplant plaintiff). In particular, Douglas Elliman has alleged that Compass disseminated the Wealth Report to Compass' clients and contacts passing it off as Compass' own materials.

Accordingly, defendant's motion to dismiss the fourth cause of action is denied.

Accordingly, it is hereby,

ORDERED that defendants' motion to dismiss the first and second causes of action is granted with leave to replead; and it is further

ORDERED that defendants' motion to dismiss the third and fourth causes of action is denied; and it is further

ORDERED that the above-captioned action is consolidated for joint trial with LuxuryLoft, Inc. v. Douglas Elliman Realty, LLC under Index No. 655264/2016 and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
LUXURYLOFT, INC.and URBAN COMPASS INC.,

Plaintiff,

-against-

Index No.
655264/2016

DOUGLAS ELLIMAN LLC, D/B/A DOUGLAS
ELLIMAN REAL ESTATE

Defendants.

-----X
DOUGLAS ELLIMAN LLC, d/b/a DOUGLAS
ELLIMAN REAL ESTATE,

Plaintiff,

-against-

LEONARD STEINBERG, HERVÈ SENEQUIER,
and URBAN COMPASS INC.,

Defendants.

-----X

And it is further,

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office, who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that defendants shall Answer the third and fourth causes of action of the Complaint within 30 days of this Order; and it is further

ORDERED that the parties shall appear before this Court for a preliminary conference on July 18, 2017 at 2.30PM.

Date: May 16, 2017
New York, New York



Anil C. Singh