ASI Sys. Integration Inc. v Mollenkopf
2017 NY Slip Op 31270(U)
June 5, 2017
Supreme Court, New York County
Docket Number: 653688/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ASI SYSTEM INTEGRATION INC.,

Plaintiff,

-against-

SCOTT MOLLENKOPF and ITSAVVY LLC,

Defendants.

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Index No. 653688/16

Mot. seq. no. 005

DECISION AND ORDER

BARBARA JAFFE, J.

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By notice of motion, defendants move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing plaintiff's first amended complaint. Plaintiff opposes and, by notice of cross motion, moves pursuant to CPLR 3214 for an order lifting the automatic stay of discovery. Defendants oppose the cross motion to a limited extent.

I. BACKGROUND

On or about August 23, 2016, plaintiff filed an amended complaint, in which he asserts that (1) defendant Mollenkopf breached a non-compete agreement; (2) both defendants misappropriated its trade secrets and/or confidential information; and (3) defendant ITsavvy tortiously interfered with its business relations as it knew of Mollenkopf's non-compete agreement before hiring him, continued to employ him, and solicited its clients in violation of the non-solicitation and confidentiality provisions of the contract between it and Mollenkopf, and

was motivated solely by a desire to intentionally harm it to increase ITsavvy's profits and/or business. (NYSCEF 47).

The Non-Compete/Non-Solicit Agreement, was signed by Mollenkopf on March 6, 2009, in exchange for $15,000. (NYSCEF 7). On April 1, 2009, Mollenkopf signed an "Acknowledgment of Receipt of Employee Handbook" (acknowledgment), thereby acknowledging, as pertinent here, that he received a copy of the employee handbook, and that he was aware that while employed by plaintiff, he would be given confidential information such as marketing strategies, customer lists, lists of potential customers, pricing policies, and other related information, all of which were "critical" to plaintiff's success and "must not be given out or used outside [plaintiff's] premises or shared with non-[plaintiff] employees." (NYSCEF 8). The acknowledgment reflects Mollenkopf's understanding and agreement that his employment was at-will absent a written contract with plaintiff stating otherwise. He also agreed that in signing the acknowledgment, he had read and understood it. (*Id.*).

The handbook also contains confidentiality and non-disclosure provisions, along with the proviso that nothing in it creates a contract between plaintiff and any of its employees. The confidentiality provisions set forth in the handbook differ from those set forth in the acknowledgment. (NYSCEF 9).

II. MOTION TO DISMISS

A. First and second causes of action

1. Contentions

Defendants assert that plaintiff's first and second causes of action must be dismissed absent a confidentiality provision or any prohibition of the use of the allegedly confidential

information contained within the Non-Compete/Non-Solicit Agreement or any other agreement between them, and that given the disclaimer within the handbook that no contractual relationship was thereby created between plaintiff and its employees, the handbook does not constitute a binding contract. They also deny that the acknowledgment constitutes an independent document that creates a contract between the parties. Rather, defendants maintain, it is part of the handbook, and thereby incorporates the disclaimer of any contractual relationship between plaintiff and its employees. (NYSCEF 42).

According to plaintiff, the first cause of action relates only to the non-compete agreement and not to confidentiality. Thus, it maintains, defendants' argument based on confidentiality is irrelevant. It also asserts that the acknowledgment is independent and thus, enforceable, and that even if not, a cause of action for breach of the common law duty of confidentiality is nonetheless stated. (NYSCEF 48).

2. Analysis

As it is undisputed that the confidentiality agreement contained within the handbook is not enforceable given the disclaimer, the sole issue here is whether the acknowledgment constitutes an independent agreement, and/or whether the confidentiality provision contained therein is enforceable notwithstanding the disclaimer set forth in the handbook.

In *Graham v Command Sec. Corp.*, the plaintiff, before commencing his employment with the defendant, signed a "Pre-Dispute Resolution Employee Acknowledgment Form" whereby he agreed to its provisions. Several days later, he signed a form entitled "Personnel Policies," thereby acknowledging receipt of the employee handbook, that his employment was at will, and that the handbook created no contract with the defendant. When the

defendant-employer moved for an order compelling enforcement of the pre-dispute resolution agreement, the plaintiff-employee argued that it was unenforceable given the disclaimer contained in the handbook. The court disagreed, finding not only that the agreement was enforceable, but that even if not, the acknowledgment that the plaintiff had signed bound him to its terms, and that the disclaimer in the handbook did not annul his prior agreement to the pre-dispute resolution procedure as set forth in the acknowledgment. (46 Misc 3d 1224[A], 2014 NY Slip Op 51931[U] [Sup Ct, Westchester County 2014]).

An agreement was also upheld in *Currier, McCabe & Assocs., Inc. v Maher*, where the defendant-employee had signed a separate employment agreement by which he acknowledged having read the plaintiff-employer's handbook and that by signing it, he had agreed to the terms and conditions set forth therein and in the handbook, notwithstanding a disclaimer in the handbook that it created no contractual relationship. The Court held that the written agreement superseded the disclaimer, which was solely and expressly intended to prevent the policies contained in the handbook from being construed as an implied employment contract, and that the defendant's execution of a separate contract in which he expressly agreed to the handbook's terms rendered the purpose of the disclaimer "inapplicable."

> It was defendant's execution of this agreement, and not any provision of the handbook, that created his contractual obligations; thus, no conflict resulted from the disclaimer's prohibition against the implication of contractual obligations directly from the handbook.

(75 AD3d 889, 891 [3d Dept 2010]).

Similarly, in *Patterson v Tenet Healthcare, Inc.*, the employee handbook contained a disclaimer against it being construed as a contract, along with an arbitration clause or provision appearing on a removable and separately labeled page contained therein pursuant to which the

plaintiff-employee acknowledged that upon receipt of the handbook, he was to sign the page, remove it from the handbook, and present it to the defendant-employer. The court held that the arbitration clause was separate and distinct from other provisions in the handbook and was enforceable, as it appeared on a page within the handbook which was to be removed upon being signed by the employee and kept in the employer's files. Moreover, the clause contained expressions of understanding and agreement that did not appear in the handbook. (113 F3d 832 [8th Cir 1997]; *see also Isaacs v OCE Business Svces., Inc.*, 968 F Supp 2d 564 [SD NY 2013] [revised handbook policy containing arbitration agreement was binding and enforceable, notwithstanding disclaimer, as revised policy appeared under separate and bolded heading, and was explicitly binding on plaintiff]).

And in *Brown v St. Paul Travelers Cos.*, the court observed that "had plaintiff signed an acknowledgment of receipt of the handbook and arbitration policy, she clearly would have evinced an intention to be bound by the agreement." (559 F Supp 2d 288 [WD NY 2008], *affd* 331 Fed Appx 68 [2d Cir 2009]; *see also Arakawa v Japan Network Group*, 56 F Supp 2d 349 [SD NY 1999] [employee bound by arbitration agreement set forth in both handbook and signed acknowledgment of handbook, which reiterated handbook's terms]).

Here, the acknowledgment plaintiff signed is a separate document containing provisions that differ from those set forth in the handbook. It specifies that its provisions are binding, and that by signing it, Mollenkopf agreed that he had read and agreed to it, not just to those set forth in the handbook. Moreover, that the confidentiality provision in the acknowledgment differs from that of the handbook permits the inference that the acknowledgment was intended as a separate confidentiality provision.

U.S. ex rel. Harris v EPS, Inc., is distinguishable as there, the acknowledgment agreement provided that it was part of the handbook and not a separate document, along with a disclaimer that "this Handbook is neither a contract of employment nor a legal document." (2006 WL 1348173 [D Vt 2006]). Defendants thus fail to establish that the confidentiality provision in the acknowledgment is unenforceable, and that plaintiff has not stated or may not maintain any claims based on it.

B. Third cause of action

1. Contentions

Defendants argue that the claim for tortious interference with business relations against ITsavvy is insufficiently pleaded absent allegations that ITsavvy engaged in the requisite improper or wrongful means, and as the parties' dispute arises in the context of free market competition between plaintiff and Itsavvy and plaintiff concedes that ITsavvy is its direct competitor. They observe that while plaintiff asserts in the amended complaint that ITsavvy acted solely by a desire to harm plaintiff, it also alleges that it did so in order to profit from additional business, thereby failing to plead that ITsavvy acted maliciously or intentionally to harm plaintiff. Defendants also maintain that plaintiff does not allege that ITsavvy acted with wrongful means such as physical violence, fraud or misrepresentation, prosecution, or some degree of economic pressure. (NYSCEF 42).

Plaintiff denies that it claims tortious interference with business relations. Rather, it alleges tortious interference with the non-compete/non-solicitation agreement, for which there is no requirement that the allegedly interfering entity have engaged in improper or wrongful means. (NYSCEF 48).

2. Analysis

While plaintiff may have mislabeled its third cause of action as one for tortious interference with "business relations" rather than contract, the allegations contained therein sufficiently plead a claim for tortious interference with contract.

III. CROSS-MOTION TO LIFT STAY

Given this result, plaintiff's cross motion is granted and any discovery stay is lifted.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is denied in its entirety; it is further

ORDERED, that plaintiff's cross motion is granted; and it is further

ORDERED, that any discovery stay is lifted and the parties are directed to appear for a preliminary conference on June 28, 2017 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

ENTER:

Barbara Jaffe, JSC

DATED: June 5, 2017
New York, New York