Rob Shore & Assoc., Inc. v Zelasko
2017 NY Slip Op 31272(U)
June 14, 2017
Supreme Court, New York County
Docket Number: 152809/15
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

ROB SHORE & ASSOCIATES, INC.,

Plaintiff,

-against-

MARK ZELASKO and LEVEL LTD. a/k/a LEVEL GROUP LTD.,

Defendants.

INDEX NO. 152809/15
MOTION DATE 04-26-17
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this motion for partial summary judgment and cross-motion for summary judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits ____cross motion ____	4 - 8
Replying Affidavits ____	9 , 10

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion pursuant to CPLR §3212, for an Order granting partial summary judgment, is denied. Defendants' cross-motion, pursuant to CPLR §3212, for summary judgment, is denied.

Plaintiff is a business management company for the music industry and provides services to its clients including: collecting receipts and paying bills, performing tour accounting and reconciliation, royalty administration services, and overseeing tax return preparation services, in return for a commission. Plaintiff's principal is Mr. Rob Shore, he alleges that in 2008 defendant Mark Zelasko was hired to work for plaintiff as one of the first employees (Mot. Exh. A).

Plaintiff alleges Mr. Shore mentored Mark Zelasko, training him to become a "business manager." Plaintiff also alleges that in early 2013, pursuant to an earlier discussion with Mr. Zelasko, they met with a lawyer to discuss a potential profit sharing agreement. In October of 2013 plaintiff's profit sharing proposal was rejected by Mark Zelasko, with an understanding that the parties would continue negotiating the terms. On February 3, 2014 Mark Zelasko resigned and left the plaintiff, starting his own business management company, co-defendant Level Ltd. a/k/a Level Group Ltd. (hereinafter referred to individually as "Level"). Plaintiff alleges it was subsequently discovered that defendant Mark Zelasko had been planning to leave and take employees with him as early as the last week of December of 2013. Defendants are alleged to have used plaintiff's time and resources to form and promote "Level." Defendant Mark Zelasko is also alleged to have breached a confidentiality agreement by soliciting clients (Mot. Exh. A).

On March 23, 2015 plaintiff commenced this action asserting causes of action for: (1) breach of duty of loyalty under the Faithless Employee Doctrine, (2) breach of contract, and (3) unjust enrichment, seeking damages and injunctive relief preventing defendants from receiving plaintiff's commission income from former clients and the return of copies of all business or confidential information removed from plaintiff (Mot. Exh. A).

Plaintiff's motion seeks an Order pursuant to CPLR §3212, granting partial summary judgment on liability.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Defendants oppose plaintiff's motion and cross-move pursuant to CPLR §3212 for summary judgment.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]). Summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Inconsistent accounts and conflicting testimony raise credibility issues that cannot be resolved prior to trial and require denial of summary judgment (Berman Brothers-Bloch Furs Inc. v. Fashion Vault Corp., 50 A.D. 3d 450, 856 N.Y.S. 2d 565 [1st Dept., 2008]).

Plaintiff argues that defendant Mark Zelasko breached his fiduciary duty, by failing to be loyal as stated in the faithless employee doctrine. Plaintiff relies on deposition testimony of former clients and a search of the computer systems by the plaintiff's Information Technology ("IT") department, showing a download to an external hard drive on December 28-29, 2013 (Mot. Exhs. K, J and M). Plaintiff alleges that at the end of January, 2014 defendant Mark Zelasko solicited former clients and, during working hours, executed a series of termination letters using a client list obtained from copied proprietary computer files. Plaintiff relies on copies of termination letters, copies of Mr. Zelasko's e-mails with clients, and two former client's deposition transcripts (Mot. Exhs. F, J, M, N and O) as proof of the defendant's actions at the end of January of 2014. Plaintiff claims that on February 3, 2014 defendants also attempted to offer jobs to two other valued employees further demonstrating a breach of fiduciary duties.

Defendants in support of their motion for summary judgment argue that there were no acts of disloyalty or breach of fiduciary duty. Mark Zelasko claims that any discussions with former clients in December of 2013 were "hypothetical" and without any inducement to leave plaintiff (Mot. Exh. M, Cross-Mot. Exh. C, p. 59). Defendants claim that the download to the external hard drive was only for purposes of working from home, and that Ted Hall, plaintiff's IT employee testified that other employees had done the same thing (Mot. Exh. I, Cross-Mot. Exh. D, p. 30). Defendants argue that plaintiff's conclusory and speculative allegations that the download was for any other purpose are refuted by Rob Shore's deposition testimony that failed to specifically identify when he advised employees not to work from home (Mot. Exh. B, Cross-Mot. Exh. E, pages 112-114). Defendants claim that Mark Zelasko prepared termination letters and written offers to plaintiff's former clients on his own time, after work, and he only made formal written offers on a one page document as he left the office on February 3, 2014.

Breach of fiduciary duty requires that an employee for their own benefit exploit an opportunity that is an asset of the corporation. "The obligation of loyalty implied by the relationship between an employee and his (her) employer rests upon the rule that a person who undertakes to act for another shall not in the same matter act for himself" (Alexander & Alexander of New York, Inc. v. Fritzen, 147 A.D. 2d 241, 542 N.Y.S. 2d 530 [1st Dept.1989]).

On a breach of fiduciary duty claim, plaintiff is required to show that the employee used plaintiff's time, facilities, or proprietary secrets, to create, form and join a competitor. Plaintiff has not specifically identified the confidential or proprietary information that was used, or established there were protocols

preventing the employee's use of the information (Frederic M. Reed & Co., Inc. v. Irvine Realty Group, Inc., 281 A.D. 2d 352, 723 N.Y.S. 2d 19 [1st Dept., 2001]). Conflicting testimony on defendants' use of plaintiff's time and resources to form a new business and to promote the business while working for plaintiff is sufficient to raise an issue of fact (Ashland Management Inc. v. Altair Investments, NA, LLC, 14 N.Y. 3d 774, 925 N.E. 2d 581, 898 N.Y.S. 2d 542 [2010]).

Plaintiff's principal could not specifically identify the material that was downloaded at the end of December of 2013. Plaintiff's arguments that Mr. Zelasko was expected to work hours other than 9:00a.m. to 5:00p.m., solicited clients and prepared terminations letters during working hours, are not specific as to the actual expected working hours. Defendants' arguments that the material used was not confidential or proprietary, and was only "hypothetical" inquiries were made of plaintiff's clients, fails to make a prima facie case for summary judgment on the breach of fiduciary claims. There remain issues of fact as to whether defendants used plaintiff's confidential information, and whether Mark Zelasko attempted to solicit clients during working hours while employed by plaintiff. The conflicting testimony and evidence presented raises credibility issues and creates issues of fact on the breach of fiduciary duty cause of action, warranting denial of summary judgment to both parties.

Plaintiff argues that it is entitled to summary judgment on the breach of contract cause of action because Mark Zelasko entered into a Confidentiality Agreement that was violated by the defendants use of confidential information to lure clients to "Level" (Mot. Exh. C).

Defendants argue that the Confidentiality Agreement is unsigned by plaintiff, and Mark Zelasko thought it was invalid (Mot. Exh. C). They claim that the lack of an enforceable contract entitles defendants to summary judgment on the breach of contract cause of action. Defendants argue that even to the extent there is an enforceable Confidentiality Agreement, there was no use of confidential information or breach identified by the plaintiff.

To establish a breach of contract claim, a party must allege the existence of an agreement, performance of the agreement by the plaintiff, breach by the defendant and damages (Second Source Funding, LLC v. Yellowstone Capital, LLC, 144 A.D. 3d 445, 40 N.Y.S. 3d 410 [1st Dept. 2016]). An agreement is generally not binding if the parties express the intention to have it reduced to writing and signed by all parties Binding agreements require a "manifestation of mutual assent"(Jordan Panel Sys. Corp. v. Turner Constr. Co., 45 A.D. 3d 165, 841 N.Y.S. 2d 561 [1st Dept. 2007]). The defendant's execution of a confidentiality agreement, and actions after signature, demonstrates an intent to be bound, where plaintiff alleges that it fulfilled its obligation under the agreements (Second Source Funding, LLC v. Yellowstone Capital, LLC, 144 A.D. 3d 445, supra at page 446).

A confidentiality agreement is a restrictive convenant and 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" (BDO Seidman v. Hirshberg, 93 N.Y. 2d 382, 712 N.E. 2d 1220, 690 N.Y.S. 2d 854 [1999]). An otherwise valid restrictive covenant cannot be enforced if it is unreasonable in time, space or scope (American Broadcasting Cos. v. Wolf, 52 N.Y. 2d 394, 420 N.E. 2d 363, 438 N.Y.S. 2d 482 [1981]). An issue of fact is created on the issue of whether defendants breached a restricive covenant by allegations that they used customers lists, had intimate knowledge of financial information and trade secrets that were used in connection with solicitation of clients (TBA Global, LLC v. Proscenium Events, LLC, 114 A.D. 3d 571, 980 N.Y.S. 2d 459 [1st Dept. 2014]).

Defendant Mark Zelasko executed the undated Confidentiality Agreement, which also states the terms of his employment and does not contain provisions rendering it binding upon signature by all parties. There remain issues of fact as to performance of the terms of the agreement by the plaintiff and the defendants alleged breach of confidentiality. Defendants and plaintiff have provided conflicting evidence as to the manner in which the responsibilities and duties were performed and whether confidential information was actually used to lure clients to the defendants' business, necessitating denial of summary judgment on both the motion and the cross-motion on the breach of contract cause of action.

Plaintiff seeks summary judgment on the claim for unjust enrichment arguing that defendants obtained commissions attributable to services to former clients prior to February 3, 2014 and for touring income for post-February 3, 2014 tour dates. Plaintiff argues it is also entitled to summary judgment for unjust enrichment on the amount of all the commissions defendants earned from former clients.

Defendants argue that the commissions are usually paid in cash when the band or musician is paid, that there is no debt for the period prior to February 3, 2014 and for post-February 3, 2014 tour dates. They argue that the plaintiff was paid all of the commissions actually owed, warranting summary judgment in defendants favor on the cause of action for unjust enrichment.

"Unjust enrichment is a quasi-contract theory of recovery, requiring that plaintiff show the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (Georgia Malone & Co., Inc. v. Ralph Rieder, 86 A.D.3d 406, 408, 926 N.Y.S.2d 494, 497 [1st Dept., 2011]). Quasi-contract theories apply when there is a bona fide dispute as to the existence of a confidentiality agreement. The plaintiff can assert causes of action for both breach of contract and unjust enrichment (Redf Organic Recovery, LLC v. Rainbow Disposal Co., Inc., 116 A.D. 3d 621, 985 N.Y.S. 2d 10 [1st Dept., 2014]).

There remain issues of fact on plaintiff's allegations and whether the defendant has or is continuing to unjustly earn profits from former clients. There remain issues of fact of whether defendants were enriched at plaintiff's expense warranting equitable relief. The issues of fact warrant denial of summary judgment on both the motion and the cross-motion.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §3212, for an Order granting partial summary judgment, is denied, and it is further,

ORDERED that defendants' cross-motion, pursuant to CPLR §3212, for summary judgment, is denied, and it is further,

ORDERED that the parties are directed to appear for a status conference in IAS Part 13, at 9:30 a.m. on October 4, 2017, at 71 Thomas Street, Room 210.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: June 14, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE