

**Ellison Sys, Inc. v Ayala**

2008 NY Slip Op 31803(U)

June 24, 2008

Supreme Court, New York County

Docket Number: 0600500/2007

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Ellison Systems

INDEX NO.

600500/07

MOTION DATE

\_\_\_\_\_

MOTION SEQ. NO.

002

MOTION CAL. NO.

\_\_\_\_\_

- v -

Ayala

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**

JUN 27 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/24/08

J. GISCHE  
HON. JUDITH J. GISCHE

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

Supreme Court of the State of New York  
County of New York: Part 10

Ellison systems, Inc. d/b/a  
Shoplet.com

Plaintiff,

Decision/Order

-against-

Index# 600500/07  
Mot. Seq. # 002

Natalie Ayala, Sacha Thomas and  
Premier & Companies, Inc.

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

**PAPERS**

Notice of Motion, LHS affirm., exhibits.....	1
Notice of Cross-Motion, GMB affirm., NA affd., SL affd., exhibits.....	2
LHS affirm., TE affd.....	3
GMB affirm., NA affd., exhibits.....	4

**FILED** NUMBERED  
 JUN 27 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Hon. Gische, J.:

*Upon the foregoing papers the decision and order of the court is as follows:*

Plaintiff moves to compel defendants Natalie Ayala ("Ayala") and Premier & Companies, Inc. ("Premier")(collectively "defendants")<sup>1</sup> to comply with its first Notice for Discovery and Inspection. Premier has cross-moved for summary judgment, a protective order and sanctions. Since the disposition of the cross-motion for summary judgment will affect the scope of the other relief requested by the parties, the court addresses such relief first. Issue has been joined and the note of issue has not yet been filed. Summary judgment relief, therefore, is available in this action. CPLR

<sup>1</sup>By decision and Order dated August 14, 2007 the case against named defendant Sacha Thomas was dismissed.

§3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

It is undisputed that Ayala used to work for plaintiff from February 2004 through December 2006. After she terminated her employment with plaintiff she then went to work for Premier. Both plaintiff and Premier are in the e-commerce business of selling office supplies. Plaintiff has brought this action alleging that Ayala entered into a confidentiality and non-compete agreement as a term of her employment with it. It claims that Ayala's new employment relationship with Premier violates both its contractual and common law rights against unfair competition. Plaintiff asserts the following causes of action against Ayala only: breach of contract (1<sup>st</sup> cause of action) and breach of duty of loyalty (2<sup>nd</sup> cause of action). It asserts the following additional causes of action against both Ayala and Premier: tortious interference with business/ contracts with plaintiffs customers (3<sup>rd</sup> cause of action); unjust enrichment (5<sup>th</sup> cause of action); misappropriation of trade secrets (6<sup>th</sup> cause of action); and unfair competition (7<sup>th</sup> cause of action). It asserts the following cause of action against Premier only: tortious interference with non-compete agreement (4<sup>th</sup> cause of action).

#### Summary of the Factual Contentions of the Parties

In support of summary judgment Premier has provided the affidavits of Ayala and Sheldon Lehman, the president of Premier. Ayala also provided a reply affidavit. Ayala admits she was employed by plaintiff, but represents herself to have been a fairly low level employee, first hired at a salary of \$25,000 and never earning more than \$40,000 per annum. She does not recall signing any non compete agreement. Although plaintiff has produced a contract purportedly signed by her as Natalie Diaz, she claims that it is a fraud. She claims to have been initially hired to do sales and that she was first given a limited

customer list (30 to 40 customers) at the beginning of her hire. She was moved, fairly quickly to procurement. The list was returned to plaintiff and she never had it or access to it or to any other customer list after that.

Ayala's primary job was to assist customers who placed orders by telephone or internet, in filling the orders. She would contact plaintiff's vendors and obtain the best price. While she acknowledges that plaintiff may have had contracts with certain of its vendors, she did not know that information. Nor did she arrange for or have access to any information about rebates that plaintiff may have gotten back from its own vendors. Her duties also included assisting plaintiff's customers with returns and/or exchanges and she did some bookkeeping. She denies having access to any records that were not generally accessible to every other employee at plaintiff. She denies ever printing any information about customer lists or business information from plaintiff's computers.

She left plaintiff's employment in December 2006 and went to work for Premier. She denies ever telling Premier about any non-compete clause and in fact denies that she signed such agreement at all. At Premier she works in customer service. She has not procured any new clients for Premier, but deals only with Premier's established base of customers. She is not aware of providing any services to any customers that are also plaintiff's customers.

Lehman denies ever knowing that Ayala signed any restrictive covenant with plaintiff before this action was commenced. He further claims that Ayala provides no unique services to Premier. She works in a call center and assists existing customers with orders or problems. She has not provided Premier with any customer lists, pricing information, or any other confidential information from Shoplet. She is not involved in

marketing strategies or pricing decisions for Premier.

In opposing the motion for summary judgment plaintiff relies primarily on the affidavit of Tony Ellison, its president and CEO. It relies on a copy of an employment agreement purportedly signed by Natalie Diaz, a name that Ayala used to be known by. Plaintiff claims that all of its employees were required to sign such an agreement. He describes Ayala's duties in more positive terms than Ayala does.<sup>2</sup> At its core, however, it is clear that her position with plaintiff was that of a support person. She was not a salesperson; she was not part of management, she did not negotiate contracts and she had limited, if any, decision making authority within the company. Ellison does dispute her the extent of her access to "proprietary information." Although Ayala denies any access, Ellison generally claims that as she was promoted within the company she had increasing computer access to such information. This is not really explained in any detail.

Ellison does not claim that Ayala copied, downloaded, printed or memorized any of this proprietary information when she left plaintiff's employ. Ellison does not identify any customer that it lost to Premier after Ayala began working for Premier. Ellison does not address Premier's assertion that it had no knowledge about any non-compete clause in any employment contract between plaintiff and Ayala.

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<sup>2</sup> He claims Ayala performed the following tasks: "purchasing; participated in the build out of purchasing procedures with key senior management; established key relationships with Shoplet's vendors and customers; built relationships with key accounts; corresponded with Shoplet's customers to increase sales; negotiated pricing and quotes on orders with Shoplet's vendors based on sensitive data provided; assisted with accounts payable and accounts receivable; and provided system training to new employees hired by Shoplet." Other than training new employees and access to information, Ellison's description of Ayala's duties is fairly consistent with her own description of duties.

## Discussion

On a motion for summary judgment, the moving party has to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).. Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See: Hindes v. Weisz, 303 AD2d 459 (2<sup>nd</sup> dept. 2003).

### The Non-compete Clause

Defendants deny that Ayala ever signed any employment agreement with a non-compete clause. They further argue, however, that even if such employment agreement exists, the restrictive covenant is unenforceable as a matter of law. Defendants argue that the non-compete clause relied upon by plaintiff is unreasonable and unenforceable because it: [1] protects materials that are not trade secrets; [2] is overboard geographically; [3] unreasonably prohibits Ayala, a low level support person, from obtaining any work within the industry and [4] there are no facts to support a

conclusion that Ayala either had access to or impermissibly used plaintiff's trade secrets. For the reasons that follow this court concludes that the non-compete clause relied upon by plaintiff is unenforceable and does not support any cause of action for breach of contract.

It is of no moment that there is a factual dispute about whether Ayala ever executed the employment agreement. Assuming *arguendo* that she did, the non-compete clause at issue is unenforceable at bar. The relevant provisions of such employment contract state:

¶4. Employee recognizes and acknowledges that Shoplet marketing methods, forms, customer lists, price schedules, pricing systems, product lists, and catalogues as same may exist from time to time, are valuable and unique assets of Shoplet's business. The Employee will not, at any time, during or after the term of this Agreement or of employee's employment by Shoplet, disclose any of the foregoing information or any part thereof, to any person whatsoever....

¶5. During the term of Employee's employment by Shoplet, and for a period of one (1) year following the termination of Employee's Employment, if Employee is engaged in or interested in, directly or indirectly, either as principal, partner, employee, consultant, officer or director of any corporation, partnership, enterprise or association, or in any other manner capacity whatsoever (including any new business started by you - alone or with others), a business the same or similar to the business in which Shoplet is engaged in any geographic market in which Shoplet is doing business or to your knowledge plan to do business, Employee shall not service or assist any person, enterprise or business entity in the solicitation or servicing of any client or customer of Shoplet."

Non-compete clauses which limit an employee from pursuing a similar vocation after termination of employment are disfavored under law. American Broadcasting Companies v. Wolf, 52 NY2d 394 (1981). This is based upon powerful public policy considerations which militate against sanctioning the loss of a person's



livelihood. Columbia Ribbon & Carbon Mfg.Co. v. A-1-A Corp., 42 NY2d 496 (1977).

If, however, such covenants are reasonably related in time and scope, not unreasonably burdensome to the employee and not harmful to the general public, they will be enforced. A restraint is enforceable only if it: [1] is not greater than is required to protect 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 NY2d 382(1999). Two touchstones of reasonableness are the geographic and temporal limitations in such covenants. Zinter Handling Inc. v. Britton, 46 AD3d 998 (3rd dept. 2007); Jays Custom Stringing, Inc. v. Yu, 2001 WL 761067 (SDNY 2001).

The cognizable employer interest under the first prong is limited to misappropriation of the employer's trade secrets or confidential client lists or protection from competition from a former employee whose services are unique or extraordinary. ENV Services, Inc. v. Alesia, 10 Misc3d 1054 (A)(Sup. Ct. Nass. Co.). While the parties may differ slightly in their description of Ayala's duties while she was employed at plaintiff, no argument is or can be made that her services were either unique or extraordinary. Plaintiff's primary contention in this action is that enforcement of the restrictive covenant is necessary to protect its trade secrets.

As my learned colleague, Justice Austin, stated in his decision of ENV Services, Inc. v. Alesaj, *supra*, the law of trade secrets applicable to non-compete clauses is as follows:

"A trade secret is defined as any formula, pattern, device or compilation of information which is used in one's business, and which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret must first of all be secret. Where the information at issue is public knowledge, or could be acquired

easily and duplicated, it is not a trade secret.

Trade secret protection will not be accorded to customer lists where the names and addresses of the customers are readily ascertainable or where client information is scattered throughout the office or in unlocked files. Information from publicly available sources is not entitled to trade secret protection. It is well settled that an employee's recollection of information pertaining to specific customers is not confidential." (citations omitted)

Applying these principles to the case at bar, makes it clear that plaintiff has no cognizable legal claim against Ayala relating to enforcement of the non-compete clause.

To the extent plaintiff seeks to protect its own product pricing information, it is not a trade secret. Defendants claim, and plaintiff does not dispute, that plaintiff publishes its own pricing information on the internet on its own web site. Plaintiff's claim that its vendors prices are trade secrets also fails. The information about what the vendors charge their own customers is readily ascertainable from the vendors themselves. Ayala states and plaintiff does not dispute that the vendors readily gave her pricing information whenever she tried to fill Shoplet's customer orders. There is every reason to believe that vendors provide their pricing information, including rebate information, to anyone who seeks to purchase goods from them. Contracts with third parties are not secrets because they necessarily involve third parties.

That only leaves the issue of customer lists. This record is fairly barren in terms of how such lists were created and how they are kept by plaintiff. There is insufficient evidence for the court to conclude one way or the other about whether such lists are actually trade secrets. The parties also have a factual dispute about whether Ayala actually had access to confidential customer lists. Even assuming that the customer

lists are protected trade secrets and that Ayala has access to them during her employment with plaintiff, there are still no facts to support a claim that the restrictive covenant at issue has been violated.

Defendants have established that Ayala did not take customer or any information with her when she left plaintiff's employ. *A fortiori* they have established that she did not communicate such information to Premier. In fact Ayala's job duties with Premier do not involve obtaining any new customers nor working with suppliers. Plaintiff has not come forward with any evidence whatsoever, circumstantial or otherwise, from which a trier of fact could conclude that plaintiff's proprietary information was misappropriated. There is no factual claim that Ayala took any lists or information with her when she was terminated or that she memorized such information. At most they claim that Ayala had access to proprietary information when she worked for plaintiff. Access to information during the course of employment is not enough to support a claim of misappropriation. Natural Organics v. Kirkendall, \_\_AD3d \_\_; 2008 WL 2291928 (2<sup>nd</sup> dept. 2008). Plaintiff has not even identified any particular customer which it claims Premier obtained as a result of such secret information.

Additionally the clause is invalid because it has no reasonable geographic limitation. Plaintiff is an e-commerce business. Although the clause by its terms is limited to wherever plaintiff has a market, defendant claims and plaintiff does not deny that plaintiff's business derives from all over the United States. The contractual geographical limitation, therefore, would impermissibly prevent Ayala, a support employee at best, from working in the same line of business anywhere else in the country. This geographic "restriction" is too broad. Jay's custom Stringing, Inc. V. Yu,

2001 WL 761067 (EDNY, 2001).

The court declines any request made by plaintiff for the court to edit the contract and only enforce it as may be reasonable. Since the court believes that plaintiff cannot identify a legitimate business interest to protect, the issue of partial enforcement does not arise. Buhler v. Maloney Consulting, 299 AD2d 190, 191( 1<sup>st</sup> dept. 2002)

Since the court finds that the restrictive covenant relied upon by plaintiff is not enforceable as a matter of law, the court grants summary judgment in favor of Ayala on the first cause of action for breach of contract.

#### Breach of Duty of Loyalty

The second cause of action for breach of duty of loyalty also fails. Even in the absence of a contractual provision, an employee has a common law duty not to disclose trade secrets to a competitor even after his or her employment has terminated. CBS Corp. V. Dumsday, 268 AD2d 350 (1<sup>st</sup> dept. 2000). Here, however, defendants have come forward with evidence proving that no confidential information was disclosed to Premier. Plaintiff has failed to come forward with any evidence tending to show the contrary.

#### Unjust Enrichment, Misappropriation of Trade Secrets, Unfair Competition

The causes of action for unjust enrichment, misappropriation of trade secrets and unfair competition all have as their underpinning a claim that Ayala shared trade secrets with Premier. Defendants have proven that no such trade secrets were shared with Premier. Plaintiff has failed to come forward with any evidence to dispute this. These cause of action likewise fail.

### Tortuous Interference with Business/Contract

The remaining two cause of action claim tortuous interference with contract and/or business. The 3<sup>rd</sup> cause of action claims that defendants have tortuously interfered with the contracts and/or business plaintiff has with its own customers. The 4<sup>th</sup> cause of action claims that Premier interfered with the restrictive covenant contained in the employment contract it had with Ayala.

The elements of tortuous interference with contract are the existence of valid contract; defendant's knowledge of that contract; defendant's intentional procurement of breach and damages. White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 NY3d 422 (2007).

Tortuous interference with business is a separate cause of action that requires a showing that through the intentional and wrongful acts of defendant, identified third parties were prevented from entering into a business relationship with plaintiff. Joan Hansen & Company, Inc. v. Everlast World's Boxing headquarters Corp., 296 AD2d 103 (1<sup>st</sup> dept. 2002); Carvel Corp. v. Noonan, 3 NY3d 359 (2004). It applies to those situations where a third party would have entered into, or extended a contractual relationship with plaintiff, but for the wrongful and intentional acts of the defendant. While the existence of a contract is not a requirement for this tort, there is a more demanding proof requirement which, in general, requires that the defendant's actions were undertaken with malice and solely done to injure plaintiff. Guard-Life Corporation v. S. Parker Hardware Manufacturing Corp., 50 NY2d 183 (1980). Shared Communications Services of ESR, Inc. v. Goldman Sachs & Co., 23 AD3d 162 (1<sup>st</sup> dept. 2005). In the case of competitors, the interference must be accomplished through

"wrongful means". Carvel Corp. v. Noonan, 3 NY2d 182 (2004).

The claim based upon interference with the restrictive covenant in the employment contract fails because the court has held that the restrictive covenant is not enforceable. In any event it fails because defendants have proven and plaintiff has not addressed the contention that Premier never had any knowledge about the restrictive covenant until plaintiff commenced this action.

Defendants have otherwise proven on this motion that they have not interfered with any of plaintiff's customers and that they have not used any wrongful means toward plaintiff. Plaintiff has not come forward with any evidence whatsoever that would support its claim of wrongful interference with business and/or contracts with its existing customers. It has not identified any customers, any contracts, or any wrongful conduct by defendants.

The court therefore finds that defendants are entitled to summary judgment dismissing the complaint. In view of this decision the issues on the motion and cross-motion concerning discovery are moot. The court otherwise finds no basis for any award of sanctions in this matter.

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel defendants to comply with discovery is denied and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing the complaint is granted in its entirety and the clerk is directed to enter a judgment in favor of defendants Ayala and Premier and against plaintiff dismissing the action together with an award of statutory costs and disbursements, and it further

ORDERED that defendants' cross motion for a protective order is denied, and it is further


ORDERED that defendants' cross-motion for sanctions is denied, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated; New York, NY

June 24, 2008

SO ORDERED:

  
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J.G. J.S.C.

**FILED**  
JUN 27 2008  
COUNTY CLERK'S OFFICE  
NEW YORK