SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61

Justice

Index Number : 650903/2012
ORKOPOULOS, ATHINA
vs.
HENNESSY, RUBYE
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/8/13

_____, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

HENNESSY FOR LATONA, INC.,

Plaintiff,

-against-

RUBYE HENNESSY, HENNESSY FURS, INC., GRS FURS, INC., and GARY SMITH,

Defendants.

----------X

DECISION AND ORDER

Index No. 650903/12

HON. ANIL C. SINGH, J.:

Defendants move to dismiss the amended complaint pursuant to CPLR 3211, for failure to state a cause of action and based upon the statute of frauds. Plaintiff opposes the motion.

The material facts are as follows.

G. Michael Hennessy was a Manhattan furrier who died in 2009. Defendant Rubye Hennessy is his widow.

The three corporate parties to the instant action are engaged in the fur business.

Plaintiff Hennessy for Latona, Inc. ("Latona"), defendant Hennessy Furs, Inc. ("HF"), and defendant GRS Furs, Inc. ("GRS") are all located at 345 Seventh

Avenue in Manhattan.

Athina Orkopoulos is the principal and president of Latona. Defendant Rubye Hennessy ("Rubye") is the owner, sole operator and principal of HF. Defendant Gary Smith is the owner, sole operator, principal and president of GRS.

After G. Michael Hennessy died, Rubye wrote a letter to Athina and Konstantinos Orkopoulos ("Orkopoulos") dated February 15, 2010. The letter states as follows:

> This is to confirm that I understand and approve the previous agreement between G. Michael Hennessy (here-in-after referred to as GMH) and Konstantinos Orkopoulos (here-in-after referred to as Gus), such agreement stating that GMH gave Gus the GMH retail business, which Gus could exercise at any time after three years in the business together with Hennessy for Latona Inc. That three year time frame passed many months ago.
>
> I do not recall seeing this in writing but I knew that GMH signed such a letter several years ago. At the time GMH was aware of his possible health problems and also the problems facing the fur industry. Our own conversations centered around the fact that neither of his sons would be able to run the business nor would I. I know that Tatiana saw the letter and its contents. I have asked her to witness today's letter.
>
> During the almost 50 years that GMH ran fur companies, he had numerous partners and he expressed to me many times that Gus was the only partner he completely trusted. Clearly I share the same thoughts.
>
> I do not need to see the letter described above; a handshake between Gus and me is sufficient.

This letter is being written over a year after Michael's death, and I have with Gus's input decided to put our GMH retail and storage business in with GRS. This was quite frankly the only workable option I had.

Gus and Athina also signed the contract I signed with GRS. In this arrangement, Tatiana and I will be employed, and Gus can spend whatever time or arrangement he wishes. The new contract, almost identical to the original with Bob Mohl, was written by GMH and Gary Smith almost 20 years ago to establish GSMH, a partnership between GMH and Gary Smith for sharing profits.

I envision that some of the profit sharing will actually belong to Hennessy for Latona. This will be clearly indicated in the monthly profit sharing statements that we will receive. This new arrangement should stop the very heavy losses Gus had in the past.

I have no ownership in Hennessy for Latona, of which Athina is president. I do intend to keep Hennessy Furs Inc. active as a conduit to handle our profits.

I hope Gus will permit me to work as long as I can, and in return I will stay in touch with our customers. I have great pride in GMH's name and reputation, and will certainly do my best to keep his memory alive.

I recognize that I don't have much knowledge about fur, so I hope Gus will stay active. His knowledge is incredible and certainly recognized by Gary, me, our customers, as well as the fur industry in general.

The relationship between Michael and me and Gus is, as I said above, is [sic.] based on trust and handshakes. I need no promises from Gus and Athina. Just keep on being my friends.

(Affirmation in Opposition, exhibit B).

The letter is signed by Rubye and Orkopoulos.

Rubye, HF, Latona, and GRS entered into a written agreement dated March 1, 2010. The document sets forth how profits and costs were to be divided based upon the retail, wholesale, storage, repair and remodeling of furs. The agreement contains the following specific provisions:

> It is clearly understood that Hennessy Furs Inc. and/or Hennessy for Latona, Inc. will retain rights and ownership to all trademarks, inventory, mailing lists including (Storage list), telephone numbers, patterns and furniture.
>
> * * *
>
> The term of this agreement begins 3-01-2010. Should GRS Furs Inc. or Hennessy Furs Inc. or Hennessy for Latona Inc. wish to terminate this agreement, the request must be in writing and delivered one to the other between 1/31 & 3/31 of the year there is to terminate [sic.]. Compliance will take place within 30 days of the written request. This agreement replaces any prior retail agreement, between GRS Furs and Rubye Hennessy and/or Michael Hennessy Sr. or any Hennessy owned company pertaining to the retail fur business.

(Affirmation in Opposition, exhibit A).

In a letter dated March 30, 2011, Smith notified Orkopoulos that Smith and Rubye were exercising the right to terminate the agreement as of March 31, 2011.

Plaintiff commenced the instant action by filing a summons and complaint on March 23, 2012. The amended complaint asserts four causes of action.

The first cause of action for breach of contract and an accounting alleges

that the defendants have failed to pay plaintiff its share of profits. The second cause of action for breach of fiduciary duty alleges that the defendants have disclosed, used and appropriated the proprietary client lists of plaintiff. The third cause of action for theft/conversion and misappropriation alleges that the defendants converted and unlawfully used protected trade secrets and proprietary information of plaintiff. The fourth cause of action for unjust enrichment alleges that the defendants have profited from aspects of the fur business belonging to plaintiff since the termination of the agreement on March 30, 2011, to the present. Plaintiff seeks damages and injunctive relief.

Discussion

Defendants' first contention is that the amended complaint should be dismissed in its entirety as against individual defendant Gary Smith because he is not a party to the agreement dated March 1, 2010.

"The directors or officers of a corporation who sign or execute a contract in their corporate or representative capacity are not personally liable in their individual capacity unless it was the parties' intent that the directors or officer were to be held liable in their individual capacity, such as by the signing of a personal guarantee, or unless fraud is involved" (14A N.Y.Jur.2d Business Relationships section 770). "Corporate officers are not individually liable upon

contracts wherein the corporate name is signed and is followed directly by the names of officers of the corporation, to which are added words denoting their representative capacity" (Id.).

On its face, the written agreement does not list Gary Smith as one of the parties to the agreement. Likewise, Smith signed the agreement, "Gary Smith, President."

Accordingly, the Court finds that the amended complaint fails to state a cause of action against defendant Gary Smith individually.

Defendants' second contention is that the complaint should be dismissed as the underlying agreement does not comport with the statute of frauds.

Defendants assert that there had been an agreement between Rubye's husband, G. Michael Hennessy ("GMH") and Konstantinos Orkopoulos pursuant to which GMH gave Konstantinos the right to "the GMH retail business." Defendants contend that the option to acquire the retail business of G. Michael Hennessy, individually, could only be exercised by Konstantinos after three years of joint operation. The letter dated February 15, 2010, states that Rubye had never seen the agreement in writing but believed GMH signed a letter to that effect.

Defendants point out that the alleged letter has not been produced. They argue that, as the option was only exercisable after three years, the agreement

could not be performed within one year and, in accordance with the statute of frauds, a written agreement was required.

Defendants' contention is clearly meritless, for plaintiff's action is not based on a breach of the alleged agreement between GMH and Konstantinos. Rather, the amended complaint alleges that defendants breached the written agreement dated March 1, 2010. Defendants' reliance upon the statute of frauds is, therefore, misplaced.

Defendants' next contention is that the documentation supplied by plaintiff – namely, the February 15, 2010 letter – refutes the allegations of the amended complaint.

"A motion to dismiss the complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (Granada Conominium III Association v. Palomino, 78 A.D.3d 996, 996 [2d Dept., 2010]).

The Court has carefully reviewed the letter, which is set out in its entirety above. In short, it is clear to the Court that the letter does not utterly refute the factual allegations of the amended complaint.

Defendants' next contention is that the first cause of action should be

dismissed to the extent that plaintiff seeks injunctive relief.

One who possesses a trade secret "will ordinarily be granted an injunction against a person whose knowledge thereof was obtained in confidence or through a confidential relationship, or in fraud or bad faith, to prevent that person from divulging it to third persons or from taking advantage of it himself or herself to the injury of the owner" (67A N.Y. Jur.2d Injunctions section 88).

Here, the amended complaint alleges that defendants have misappropriated trade secrets in the form of proprietary client lists. Accordingly, the Court finds that the amended complaint properly asserts a claim for injunctive relief.

Next, defendants contend that the cause of action alleging breach of fiduciary duty should be dismissed for the reason that there is no ongoing fiduciary duty once the parties' agreement terminated.

In response, plaintiff asserts that since defendants concede that they are in possession of proprietary customer lists and intend to continue using them for their own benefit, there is a viable claim for breach of fiduciary duty.

In light of the allegation that defendants are still in possession of the proprietary information, the Court finds that the amended complaint properly states a cause of action for breach of fiduciary duty, even if we assume for the sake of argument that the agreement has terminated.

Next, defendants contend that the third cause of action alleging theft/conversion and misappropriation of trade secrets should be dismissed, contending that the documentary evidence plaintiff has produced refutes the claim that the lists belong to it.

In short, the Court disagrees with defendants' conclusory characterization of the documentary evidence. Accordingly, defendants' contention is meritless.

Defendants' final contention is that the fourth cause of action for unjust enrichment should be dismissed on the grounds that the claim seeks damages for sales, storage, repairs and cleaning when, at best, the documentary evidence offered reflects an option to secure the personal retail sales business of GMH, not the corporate retail business and not any storage, repair and cleaning business.

Once again, defendants' conclusory contention regarding the documentary evidence goes to the merits of the action.

Accordingly, it is

ORDERED that the motion to dismiss the amended complaint is granted in part, and the amended complaint is dismissed in its entirety as against defendant Gary Smith, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant Gary Smith; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the remaining defendants are directed to answer the amended complaint within twenty (20) days; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the Court's records to reflect the change in the caption; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on November 6, 2013, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 10/8/13
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE