American Stock Transfer & Trust Co. v Alliance Advisors, LLC
2014 NY Slip Op 30288(U)
February 3, 2014
Sup Ct, New York County
Docket Number: 104249/11
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES PART 59
Justice

AMERICAN STOCK TRANSFER & TRUST COMPANY, LLC and PHOENIX ADVISORY PARTNERS, LLC,

Plaintiff,

- v -

ALLIANCE ADVISORS, LLC, MATTHEW BOLGER and JOSEPH CARUSO,

Defendants.

Index No.: 104249/11
Motion Date: 01/14/2014
Motion Seq. No.: 003
Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this motion for a protective order pursuant to CPLR 3103 and "attorneys' eyes only" provision in a confidentiality order and cross motion to compel discovery and for a confidentiality order without "attorneys' eyes only" provision.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits/Notice of Cross Motion -Exhibits	2, 3, 4
Replying Affidavits - Exhibits	5

Cross-Motion: ☒ Yes ☐ No

Plaintiffs move for a protective order pursuant to CPLR 3103 limiting the defendants' request for customer information and financial documents to those records that are directly relevant to the damages in this action and for the entry of an order for the production and exchange of confidential information with an "attorneys' eyes only" provision. Defendant Alliance Advisors, LLC, cross moves for an order compelling plaintiffs to disclose

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

its customer information and financial documents, including a response to interrogatories propounded by defendant, and to preclude plaintiffs from introducing such evidence at trial as they fail to produce, and for an order for the production and exchange of confidential information without an "attorneys' eyes only" clause.

Both motion and cross motion shall be granted in part and denied in part.

In Hertz Corp. v Avis, Inc., 106 AD2d 246 (1st Dept 1985), an action for unfair competition, the First Department overturned the order of the trial judge that compelled defendant Avis, Inc. to disclose confidential financial records in the absence of a claim that defendant's alleged misappropriation of plaintiff's trade secrets by recruiting plaintiff's management personnel resulted in a loss of profits to plaintiff. Finding that the appropriate test to be applied to plaintiff's discovery notice in light of defendant's timely motion for a protective order was one of usefulness and reason, the Court held that the documents sought were not subject to discovery because they were irrelevant to plaintiff's claim for damages, inasmuch as plaintiff did not contend that it had lost profits as a result of defendant's actions, but rather sought damages based on defendant's increased profits. The Court observed that while admittedly the measure of damages in an unfair competition case includes loss of profits

suffered by plaintiff, there is no presumption of law or fact that plaintiff would have made the sales that defendant made. In other words, the Court stated that there is no presumption of law or fact that should plaintiff demonstrate that defendant earned "ill gotten profits", such profits would represent the profits that plaintiff would have earned but for defendant's unfair competition. The Court ruled that in any event as plaintiff did not claim that it suffered any loss of profits resulting from defendant's tortious acts, the documents related to defendant's finances that were sought by plaintiff were irrelevant to the issue of the issue of damages, and were therefore not subject to discovery by plaintiff.

Here, plaintiffs complaint alleges business defamation, injurious falsehood, tortious interference with ongoing and prospective business relations, and prima facie tort. Their complaint as to damages alleges with specificity only Disney as the lost customer. In its disclosure pursuant to Federal Rules of Civil Procedure 26(a)(1), which plaintiffs made before the action at bar was remanded to this court, the plaintiffs name no customer that they lost as a result of defendant's alleged tortious acts. Since the only special damages that plaintiffs allege is the loss of their customer Disney, its claim for special damages is limited to such lost profits as arose from the loss of that customer. To the extent that plaintiffs claim trade

libel per se, they are not required to allege special damages, and general damages suffice. Frawley Chem. Corp. v Larson Co., Inc., 274 AD 643 (1st Dept 1949). In the case of general damages, plaintiffs may recover nominal damages, and such damages may be inferred from proof of special damages. Wolf St. Supermarkets v McPartland, 108 AD2d 25, 33. Since the plaintiff's loss of profits from the failure of their transaction with Disney are the only special damages that plaintiffs claim, the defendants may discover those financial records or customer information that pertain(s) only to such lost customer Disney. Of course, since plaintiffs will produce only the records that pertain to Disney, they are foreclosed from introducing at trial any documents or information related to other customers, which they have been protected from disclosing.

On the same basis, defendant is entitled to discover financial records that pertain to the Disney business of plaintiffs only.

To the extent that defendant seeks an accounting of financial records that concern expenses, such as overhead, a portion of which are pertinent to any business plaintiffs contend that they would have had with Disney but for the defamatory letter allegedly sent by defendant, the examination of such records by defendant shall be deferred until plaintiffs' right of

recovery has been established. See Hertz, supra, 251 (concurring opinion).

In summary, defendant is entitled to discover from plaintiffs all customer information and financial documents that pertain to any prospective or ongoing business with Disney.

With respect to plaintiffs' contention that the confidentiality agreement should have a provision for "attorneys' eyes only" with respect to disclosure of certain records, plaintiffs have "failed to carry [their] burden of showing that the information ordered to be disclosed constitutes trade secrets protected from disclosure". Susan D. Fine Enters., LLC v Steele, 66 AD3d 614 (1st Dept 2009).

Accordingly, it is hereby

ORDERED that plaintiffs' motion for a protective order pursuant to CPLR §3103 is granted to the extent that the plaintiffs shall disclose financial documents and customer information that pertain to their alleged ongoing and prospective relationships with Disney and defendant's demands with respect to other customers are stricken; and it is further

ORDERED that the cross motion of defendant to compel plaintiffs to disclose is granted to the extent of the limitation in the above decretal paragraph; and it is further

ORDERED that the motion of the plaintiffs for a confidentiality order that contains an "attorneys' eyes only"

provision is denied; and the cross motion of the defendant Alliance Advisors, LLC for a confidentiality order without such provision is granted; and it is further

ORDERED that the parties shall submit a preliminary conference order and a confidentiality in accordance with this order; and it is further

ORDERED that counsel shall appear in IAS 59, 71 Thomas Street, Room 103, New York, New York for a preliminary conference or submit such preliminary conference order on February 11, 2014, 2:30 PM.

This is the decision and order of the court.

Dated: February 11, 2014 ENTER:

DEBRA A. JAMES J.S.C.