New York Merchant Servs., Inc. v Yoo
2015 NY Slip Op 31667(U)
August 31, 2015
Supreme Court, Kings County
Docket Number: 502519/15
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of August, 2015.

PRESENT:

HON. KAREN ROTHENBERG,
Justice.

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NEW YORK MERCHANT SERVICES, INC. D/B/A FIDELITY PAYMENT SERVICES,

Plaintiffs

- against -

Index No. 502519/15

PAUL YOO, GLOBAL NETWORK TELECOM, INC., KOAM MERCHANT SERVICES CORP. A/K/A KORAM MERCHANT SERVICES,

Defendants.

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The following papers numbered 1 to 7 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4
Opposing Affidavits (Affirmations)	5-6
Reply Affidavits (Affirmations)	7-8
___________Affidavit (Affirmation)	
Other Papers Plaintiff's Memoranda of Law	9,10

Upon the foregoing papers, plaintiff New York Merchant Services, Inc. d/b/a Fidelity Payment Services (plaintiff) moves, by order to show cause, for a preliminary injunction (a) enjoining defendants Paul Yoo, Global Network Telecom, Inc. and Koam Merchant Services

Corp. a/k/a Koram Merchant Services (Koam) (collectively defendants), as well as their affiliates, representatives and agents (including without limitation Anthony Jang [a/k/a Anthony Chang a/k/a Anthony Jung], Seon Ju Kim, Sung Yoon Kim [a/k/a Sem Ju Kim], Hae Kim [a/k/a Hai Sung Kim a/k/a Hye S. Kim]) Simon Bai and Sooboc Lee), from soliciting, for themselves or any third party, any of plaintiff's merchant accounts, including those accounts that were solicited by defendant Yoo or any of his affiliates on behalf of plaintiff, for a period of two (2) years, or such time the court deems reasonable and appropriate; (b) enjoining defendants and their affiliates, representatives and agents from engaging or participating in any business that is in competition in any manner whatsoever with the business and/or contractual relationships of plaintiff, for a period of two (2) years, or such time the court deems reasonable and appropriate; and (c) enjoining defendants and their affiliates, representatives and agents from using, publishing, or disclosing any "confidential information" of plaintiff, including all proprietary, secret or confidential information or data relating to plaintiff and any of their respective affiliates, operations, employees, independent sales organizations, agents, products or services, clients, customers or potential customers or merchants, for a period of two (2) years, or such time as the court deems reasonable and appropriate. Defendant Koam cross-moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint insofar as asserted against it.

Facts and Procedural History

Plaintiff is an independent sale office (ISO) in the credit and debit card processing industry. According to the complaint, as an ISO, plaintiff's general business purpose is to market and solicit applications for credit and debit card processing services from merchants on behalf of larger ISOs, or credit card processors, including a firm called First Data. Specifically, plaintiff solicits merchants to be "boarded" or provided to First Data either directly or through its own "downline" ISOs and sales agents.

In exchange for soliciting merchants, plaintiff collects commissions (or residuals) generated by each credit and debit transaction processed on behalf of the merchants which it has procured. Consistent with industry practice, plaintiff pays a percentage of the residuals that it collects from processors or larger ISOs to plaintiff's downline ISOs and sales agents, pursuant to separate marketing agreements between plaintiff and each ISO or sales agent. In consideration for payment of residuals, plaintiff's ISOs and sales agents agree to work exclusively for plaintiff, not to solicit plaintiff's merchant accounts, not to compete directly with plaintiff and not to divulge or misuse any confidential information belonging to plaintiff.

In December, 2008, defendant Yoo began working for plaintiff as a sales agent, and entered into a "Fidelity Payment Services-Merchant Services Sale Agent Agreement" with plaintiff which contained confidentiality and non-compete/non-solicitation clauses. Under this agreement, and in exchange for a $3000 monthly salary for six months, Yoo promised to market plaintiff's services to the Korean-American community by, among other things,

[* 4]

advertising in Korean language newspapers and printing Korean language brochures and business cards, most of the costs of which were paid for by plaintiff.

On or about July 23,2012, Yoo and his corporation, defendant Global Network Telecom, Inc. (Global), entered into a second agreement with plaintiff (the Agreement), pursuant to which Yoo agreed to identify and solicit merchants to sign merchant applications for credit card processing services through plaintiff, in exchange for compensation in accordance with a fee schedule, and to hire subagents, who would sign their own non-compete agreements with plaintiff prior to soliciting merchants, and who would receive payments from Yoo's share of residuals. Yoo's Agreement and the agreement entered into by his affiliates prohibited Yoo and his affiliates from, among other things, soliciting plaintiff's merchants, competing with plaintiff, using any of plaintiff's confidential or proprietary information for their own advantage or divulging such information to third parties, and soliciting merchants for any credit card processor or ISO, except plaintiff, for so long as Yoo and his affiliates were receiving compensation from plaintiff or for a period of two years after leaving plaintiff.

The complaint alleges that Yoo and Global thereafter hired their own agents to solicit merchants to be boarded through plaintiff, including those agents named by plaintiff in its moving papers. On or about October, 2013, Yoo began boarding (obtaining) new merchant accounts for credit card processing directly with First Data and/or other ISOs or processors, without placing the merchant accounts through plaintiff; Yoo's monthly productions diminished exponentially; and that since that time, defendants solicited merchants who were previously boarded with First Data or other ISOs or processors through plaintiff.

The complaint further alleges that on or about June 19, 2014, Yoo incorporated defendant Koam, without notifying plaintiff, to solicit merchants for credit card processing for ISOs and processors other than plaintiff, thereby directly competing with plaintiff. According to the complaint, at least 24 merchants that were previously boarded through plaintiff cancelled their services or stopped processing with plaintiff; Yoo, transferred three merchants away from plaintiff to be processed directly through Yoo and Koam with First Data and that there may be many more such instances. As a result of defendants transferring merchants' credit card processing away from plaintiff, since June, 2014, the monthly revenues from residuals on the accounts submitted by Yoo to plaintiff dropped by one-third, and Yoo has completely ceased submitting new business to plaintiff. The complaint further alleges that unless enjoined, defendants, having used the goodwill and resources plaintiff previously provided, will move all of the merchants previously submitted to plaintiff by Yoo and his agents away from plaintiff, and will cause plaintiff irreparable harm by operating a competing business.

By summons and complaint dated March 4, 2015, plaintiff commenced the instant action against containing six causes of action: breach of contract, misappropriation of trade secrets and confidential information, unfair competition, tortious interference with contract, unjust enrichment, and an action on a personal guarantee against Yoo alone. By order to show cause dated March 5, 2015, plaintiff moved for the instant preliminary injunction, which contained a temporary restraining order enjoining defendants and their affiliates from soliciting any of plaintiff's merchant accounts, competing with plaintiff, or using or disclosing any of plaintiff's confidential or proprietary information for a period of two years.

Motion for Preliminary Injunction

"To obtain a preliminary injunction, a movant must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor" (*Matter of Armanida Realty Corp. v Town of Oyster Bay,* 126 AD3d 894, 894 [2015]). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*id.* at 894-895). "Although the purpose of a preliminary injunction is to preserve the status quo pending a trial, the remedy is considered a drastic one, which should be used sparingly" (*id.* at 894).

In support of its motion for a preliminary injunction, plaintiff argues that it has demonstrated a likelihood of success on the merits on all of its causes of action as to defendants. In substance, plaintiff argues that defendants solicited its merchants, transferred merchants away from it to Koam, competed with plaintiff by working for Koam; used its confidential customer lists; wrongfully induced its merchants to breach their agreements with it and board their processing through defendants or another ISO or processor; and was unjustly enriched as a result. Plaintiff also contends that irreparable injury should be

[* 7]

presumed based upon the loss of its customer list and Yoo's solicitation of its customers, and that the equities tip in its favor because Yoo entered into the Agreement for valued consideration, i.e. salary and operating expenses.

In opposition, Yoo first argues that the covenant not to compete is overly broad on the grounds that the secret customer list to which plaintiff refers consists of merchants with whom he had former business relationships which he nurtured, cultivated, and developed over the years, and other clients which he obtained on "his own accord." He also contends that the covenant is not limited geographically, making it an unreasonable worldwide restriction. Yoo also argues that he has not misappropriated trade secrets, again asserting that the confidential customer lists consist of merchant accounts he generated through former business relationships, and that these merchants are in fact "[v]irtually any business that accepts credit cards/debit[] cards," obtained by walking down the street and cold calling them, namely they are readily "identifiable through non-confidential means."

Yoo further claims that he has not solicited any merchant accounts held by plaintiff, as evidenced by the fact that only 24 out of 200 merchants he brought to plaintiff have left, some of which expressed dissatisfaction with plaintiff's services, and that only 3 have chosen to contract with Koam of their own accord.

Yoo asserts that plaintiff breached the Agreement by failing to pay him proper residuals and therefore cannot seek to enforce it. Finally, Yoo contends that he is not and has

[* 8]

never been an owner or shareholder of Koam, and that Koam is not his alter ego. However, Yoo concedes that in July of 2014, Koam engaged his services.

In support of its motion to dismiss the complaint against it, Koam argues, that Yoo is not a shareholder, and that Mr. Taeho is the owner of Koam, and a shareholder of Koam along with In Soon Oh; that Koam and Yoo agreed on Yoo's employment as Koam's managing director in July, 2014. In substance, Koam contends the Agreement is not enforceable against it, as Koam did not exist at that time of the Agreement, and is a distinct entity from Yoo. Koam concludes that since the only allegations against it are based upon a theory of alter ego, which have not been pled with sufficient specificity, the complaint insofar as asserted against it must be dismissed and injunctive relief as to him must be denied.

Covenants not to compete are justified by the employer's need to protect itself from unfair competition by former employees (*Scott, Stackrow & Co., C.P.A's, P.C. v Skavina*, 9 AD3d 805, 806 [2004], *lv denied* 3 NY3d 612 [2004]; *Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1001 [2007]). "Generally, negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness" (*Reed, Roberts Associates, Inc. v Strauman*, 40 NY2d 303, 307 [1976]). "The modern, prevailing common-law standard of reasonableness for employee agreements not to compete applies a three-pronged test" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388 [1999]). Specifically, "[a] restraint 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" (*id.* at 388-389). A violation of any prong renders the covenant invalid (*BDO Seidman,* 93 NY2d at 388; *see also Brown & Brown, Inc. v Johnson*, 115 AD3d 162, 167-168 [2014]).

"An employer's legitimate interest can include preventing an employee from misappropriating trade secrets or confidential customer lists or keeping an employee with unique or extraordinary skills from joining a competitor to the employer's detriment" (*1 Model Mgt., LLC v Kavoussi*, 82 AD3d 502, 503 [2011]). Even where . . . there is no showing that a former employee has obtained a competitive advantage through the misappropriation of confidential customer information or that the employee possessed unique or extraordinary abilities, the employer retains 'a legitimate interest in preventing former employees from exploiting . . . the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment'" (*Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 806, quoting *BDO Seidman,* 93 NY2d at 392). "[U]nder such circumstances, an anticompetitive covenant may prevent the competitive use of client relationships that the employer assisted the employee in developing through the employee's performance of services in the course of employment (*id.*).

On the other hand, customer lists are not entitled to trade secret protection if such lists are 'readily ascertainable from sources outside [plaintiff's] business'" (*Marcone APW, LLC v Servall Co.*, 85 AD3d 1693, 1695 [2011], quoting *Columbia Ribbon & Carbon Mfg. Co.*

v A-1-A Corp., 42 NY2d 496, 499 [1977]). However, even assuming that the misappropriated information is not entitled to trade secret protection, injunctive relief may be warranted on the alternative ground of breach of trust by the misappropriation of proprietary information (*Marcone APW, LLC,* 85 AD3d at 1696).

Finally, a non-solicitation covenant may be over broad and therefore unenforceable 'if it seeks to bar the employee from soliciting or providing services to clients with whom the employee never acquired a relationship through his or her employment'" (*Brown & Brown, Inc.,* 115 AD3d at 170-171, quoting *Scott, Stackrow & Co., C.P.A.'s, P.C.,* 9 AD3d at 806). Where an agreement contains a restrictive covenant that is overly broad, "[t]he determination of whether an overly broad restrictive covenant should be enforced to the extent necessary to protect an employer's legitimate interest involves 'a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement'" (*Scott, Stackrow & Co., C.P.A.'s, P.C.,* 9 AD3d at 806, quoting *BDO Seidman,* 93 NY2d at 394). "Factors weighing against partial enforcement are the imposition of the covenant in connection with hiring or continued employment--as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust--the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad" (*id.*, quoting *BDO Seidman,* 93 NY2d at 395).

Section 6.1. of the Agreement, entitled "Agent Non-Solicitation Obligation," provides that:

[* 11]

> "Agent agrees that, during the Term hereof, so long as Agent is receiving compensation hereunder and for a period of two (2) years thereafter[,] neither it nor any of its affiliates will directly or indirectly itself or permit or assist any third party to as an employee, employer, consultant or in any other capacity to call on, solicit, take away, or attempt to call on, solicit, or take away any of the merchants, customers or Merchants of [FPS (plaintiff)] *whether referred by Agent or not*. During such time, Agent shall also not itself or permit any third party to (a) directly or indirectly refer any FPS merchant or Merchant to any third party for credit card or debit card processing or related services; (b) entice, induce or in any manner influence any person or entity who is, or shall be in direct or indirect service of FPS to leave the same for the purpose of engaging in a business or being employed by or associated with any other related business; or (c) engage or participate *in any business that is in competition in any manner whatsoever with the business and/or contractual relationships of FPS, Bank or other sponsoring banks or processors of FPS*" (emphasis added).[1]

Here, plaintiff has failed to demonstrate that the non-compete/non-solicitation covenants in section 6.2 are necessary to protect its legitimate business interests and that they are not unduly broad. First, these covenants do not contain any limitation as to area or geography, as they either apply to the entire country, as plaintiff asserts in its reply, or more restrictively, worldwide (*Yedlin,* 102 AD3d at 770 [where restrictive covenant applied to entire United States and precluded plaintiff/employee from participating in projects that involved defendants/employers' present or former clients, restrictive covenant was unenforceable]). Second, these covenants prohibit Yoo from working in any business

[1]Merchant" is defined in the Agreement as "each party solicited by Agent with which FSP and/or a Member Bank enter into a Merchant Agreement as a result of such solicitation." "Member Bank" is defined in the Agreement as "any member of a Card Association that has registered FPS as its agent to provide Merchant Card Services."

tangentially related to plaintiff, providing that Yoo, post-employment, may not "engage or participate in any business *that is in competition in any manner whatsoever with [plaintiff]*" (*id*; *compare TSIG Consulting, Inc. v ACP Consulting LLC,* 2014 NY Slip Op 32232 [U], *13 [Sup Ct, New York County 2014] [non-solicit covenant prevented former employees from diverting sales and/or business offered or performed by plaintiff from plaintiff and prohibited employees from soliciting *any of plaintiff's customers identified by plaintiff to employees as potential customers or companies identified by plaintiff to employees as customers, including but not limited to those solicited by employees or with whom employees became acquainted while working for plaintiff*] [emphasis added]). Moreover, these covenants are blanket provisions which do not distinguish between merchants which Yoo obtained by developing and cultivating business relationships prior to working for plaintiff and those merchants which Yoo obtained by virtue of working for plaintiff (*TSIG Consulting, Inc.,* 2014 NY Slip Op 32232 [U], *12]). Accordingly, these covenants are overly broad.

Moreover, plaintiff has failed to make any argument in support of its motion that these covenants should be partially enforced (*Gilman & Ciocia, Inc. v Randello*, 55 AD3d 871, 872 [2008]; *Scott, Stackrow & Company,* 9 AD3d at 807). While plaintiff argues, for the first time in its reply, that a court may modify an overly broad restrictive covenant, plaintiff improperly shifts the burden of making this showing to defendants, asserting that defendants have failed to argue that they were "coerced or tricked . . . into entering into some over broad restrictive covenants" in the Agreement. Accordingly, plaintiff is not entitled to a preliminary injunction based upon the non-compete/non-solicitation covenants in the Agreement because it has failed to demonstrate that it will likely succeed on the merits in seeking to enforce these covenants against defendants.

Plaintiff next argues that it is entitled to a preliminary injunction based upon defendants' alleged misappropriation of trade secrets and confidential information, and upon the grounds that defendants engaged in unfair competition, all claims premised upon plaintiff's contention that it maintained a confidential customer list which defendants allegedly misappropriated to obtain merchants for their own competitive use. However, "[a] trade secret must first of all be secret" (*Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]; *Faiveley Transport Malmo AB v Wabtec Corp.*, 559 F3d 110, 117 [2d Cir 2009] ["To succeed on a claim for the misappropriation of trade secrets under New York law, a party must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means"]).

Here, plaintiff has not established that defendants possessed a trade secret or confidential information. Plaintiff makes conclusory assertions, without articulating the basis for its claims, namely: "the identity of its merchant accounts constitutes a protected trade secret that has been misappropriated by [d]efendants," and that its customer lists, including the merchants that were boarded with it by Yoo and his agents, "constitute trade secrets that are not known by persons outside of [p]laintiff . . . and its employees and agents." While plaintiff also argues that it has lost 24 of its 200 merchants, and that 7 of its former merchants are now boarded with Koam, these facts fail to establish by clear and convincing evidence that plaintiff's customer lists contained confidential information. In any event, plaintiff presents no proof that Yoo or Koam contacted merchants which formerly boarded with plaintiff (*Arnold K. Davis & Co. v Ludemann*, 160 AD2d 614, 616 [1990]). Further, although plaintiff repeatedly emphasizes that it paid Yoo substantial sums for his start-up and operating costs without which its trade secrets could have been acquired, plaintiff fails to explain why this is the case. "Generally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers" (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 [1972]), "notwithstanding the plaintiffs' expenditures of time and money in compiling the customer list" (*Starlight Limousine Serv. v Cucinella*, 275 AD2d 704, 705 [2000]). Notably, although Yoo does not dispute that plaintiff paid for his operating expenses and six months of salary, plaintiff makes no showing as to the amount of funds expended on Yoo's operating costs, nor the duration; the complaint only indicating, "upon information and belief," that these funds were expended (*see Metal & Salvage Ass'n v Siegel*, 121 AD2d 200, 201 [1986] [no trade secret found where plaintiff made no showing that it expended any sums on advertising or such efforts and that no more than $150,000 was alleged to have been spent over a three-year period, without any specification as to how it was spent]). Even more tellingly, plaintiff alleges in its complaint that its "business purpose and model is to canvas the market," and defines its business as "marketing to business entities that accept credit cards . . . as payment for goods and services," undermining its claim that its customer lists constituted trade secrets and/or confidential information, not identifiable through confidential means. Nor does plaintiff explain how it used "extensive measures" to protect these alleged trade secrets, but for requiring its agents to sign confidentiality agreements. Finally, although plaintiff argues that a claim for unfair competition may be predicated upon "the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets" (*Beverage Mktg. USA v S. Beach Bev. Co.*, 20 AD3d 439, 440 [2005] [internal citations and quotation marks]), plaintiff has still failed to demonstrate that its customer lists constituted trade secrets or that the information they contained was not readily ascertainable to others in the card processing industry (*1 Model Mgt., LLC,* 82 AD3d at 503; *compare Marcone APW, LLC,* 85 AD3d at 1695-1696 [2011]), nor has plaintiff demonstrated that defendants used these customer lists for their own competitive advantage.

Even assuming that plaintiff has made some showing that Yoo transferred away seven of plaintiff's former clients to Koam by virtue of the invoices plaintiff has annexed, plaintiff has still failed to show by clear and convincing evidence that defendants used its confidential customer lists to do so.

In any event, while "issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits . . . to such a degree that it cannot be said that the plaintiff established a clear right to relief" (*Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d 612, 613 [2008]). Here, while it appears from the complaint that Yoo began working for plaintiff in 2008, Yoo avers in his sworn affidavit that he was never provided with a client list from plaintiff; that the secret client list to which plaintiff refers consists of his former business relationships that he nurtured and developed over the years and other clients he signed up on his own accord; that he signed up "his account" (presumably for plaintiff), through prior business relationships and cold calling other businesses; and that he did not solicit customers from plaintiff, although some chose to leave plaintiff and contract with Koam of their own accord. Thus, even assuming that plaintiff has raised an issue of fact, the facts with respect to this discrete issue are in dispute, and thus it cannot be said that plaintiff established a clear right to preliminary injunctive relief on this ground (*id.*).

Plaintiff has also failed to establish a right to a preliminary injunction based upon its claim for tortious interference with contract as plaintiff has failed to demonstrate that defendants solicited its merchants to process through defendants or through an ISO or processor other than itself. Notably, even plaintiff concedes that it only "adequately pleaded" this cause of action," as opposed to having established its right to injunctive relief by clear and convincing evidence.

In light of the above discussion, namely the unenforceability of the non-compete and non-solicitation clauses (and therefore the failure to establish breach of contract), and the failure of plaintiff to demonstrate that it will likely succeed on the merits on its causes of action for misappropriation of trade secrets, unfair competition, and tortious interference with contract, plaintiff is not entitled to a preliminary injunction.[2] Therefore, plaintiff's claim of irreparable harm must also be rejected as it is based primarily upon its claims that defendants have misappropriated its customer lists and violated its non-solicitation covenant.

Further, while plaintiff claims, based upon *Cherrnoff Diamond& Co. v Fitzmaurice, Inc.* [234 AD2d 200, 203 [1996]), that the equities are in its favor because Yoo agreed to the restrictive covenant for valued consideration, this case is distinguishable from *Chernoff,* because there, the parties engaged in extensive negotiations represented by counsel. There is no such showing here. Plaintiff also claims that defendants will not suffer any harm if the injunction is granted. However, based upon the overly broad language of the Agreement, defendants will essentially be prevented from engaging in their livelihood (*Yedlin*, 102 AD3d at 770). Under the circumstances, "plaintiff [has] failed to establish that a balancing of the equities favors provisional relief because it has not shown that the absence of a preliminary injunction would cause it greater injury than the imposition of the injunction would inflict

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[2]Plaintiff does not make any arguments with respect to its cause of action for unjust enrichment as to Yoo.

upon the defendant" (*Copart of Conn., Inc. v Long Is. Auto Realty, LLC*, 42 AD3d 420, 421 [2007]).

Motion to Dismiss

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court should accept the facts alleged in the complaint as true and afford the proponent the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*MVB Collision, Inc. v Allstate Ins. Co.*, 129 AD3d 1041, 1042 [2015]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2007] [internal citations and quotation marks omitted]).

As an initial matter, the complaint contains only legal conclusions without any supporting factual allegations that Koam is the alter ego of Yoo (*see Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2d 585, 587 [1987] [internal citations and quotation marks omitted]. In this regard, the complaint merely alleges that "upon information and belief," Yoo is "a director, officer, principal or authorized agent on behalf of . . . Koam," and held himself out as Managing Director of Koam. It further alleges that:

> "Upon information and belief, [d]efendant Koam is a mere alter ego and/or assignee of [d]efendant Yoo, which is dominated by [d]efendant Yoo and which [d]efendant Yoo has utilized to defraud his creditors, including [plaintiff] . . ." (¶15).

> "Upon information and belief, [d]efendant Yoo has utilized [d]efendant Koam to perpetrate a wrong or injustice upon [plaintiff] . . . , namely to breach the restrictive covenant in the Agreement . . ." (¶16).

Accordingly, to the extent plaintiff bases its claims against Koam on the grounds that it is the alter ego of Yoo, namely the first cause of action for breach of contract, such claims must be rejected.

With respect to the cause of action for misappropriation of trade secrets and confidential information, a plaintiff must allege "(1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means" (*Faiveley Transport Malmo AB,* 559 F3d at 116-117).

Here, the allegations of the complaint alleging that plaintiff possessed a trade secret or confidential information are impermissibly vague. In this regard, the complaint only alleges, in conclusory terms, that its customer lists are trade secrets unknown to those except plaintiff and its agents; that they are used to gain substantial economic advantage over their competitors, which do not have to them; that extensive (albeit unidentified) measures are used to protect them, including having their agents sign confidentiality and non-solicitation agreements; and that these lists cannot be easily acquired, duplicated and used by others without expending significant costs (*see Coram Country Lanes, LLC v William DeCicco,* 2015 NY Slip Op 30893 [U], *4, Sup Ct, Suffolk County 2015] ["the plaintiffs' conclusory assertions are insufficient to establish that their pricing, promotional, and marketing information constitute trade secrets. The mere fact that the plaintiffs kept the information from others does not confer trade-secret status upon it"]; *compare Worldcare Intl. Inc. v Kay*, 36 Misc3d 1204 [A], *39 [Sup Ct, Suffolk County 2012], *affd in part, modified in part* 119 AD3d 554 (2014).

Moreover, although the complaint also alleges that "defendants" used these customer lists "in violation of their positions of trust and authority on behalf of [p]laintiff," it merely lumps Koam with Yoo and his agents, and thus fails to allege, with any specificity, that Koam used a trade secret in breach of an agreement or duty. (*cf. Aetna Casualty & Surety Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1981].

As to the cause of action alleging common-law unfair competition, "to sustain such a claim, the plaintiff[] must show that the defendants misappropriated the plaintiff['s] labors, skills, expenditures, or good will and displayed some element of bad faith in doing so" (*Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 692 [2d Dept 2007], citing *Precision Concepts v Bonsanti*, 172 AD2d 737 [1991].

Here, the complaint fails to allege how Koam, in particular, misappropriated plaintiff's labors, and displayed some element of bad faith in doing so, once again lumping Koam with all defendants (*cf. Aetna Casualty & Surety Co.,*84 AD2d at 736*; Bianco,*2009 NY Slip Op 32586 [U], *5-6).

To establish a cause of action for tortious interference with contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *see also MVB Collision, Inc.*, 129 AD3d at 1043). Moreover, "[t]he plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct" (*Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036 [2011] [internal citations and quotation marks omitted]; *see also Washington Ave. Assocs. v Euclid Equip.*, 229 AD2d 486, 487 [1996], citing *Israel v Wood Dolson Co.*, 1 NY2d 116 [1956] [same]). "Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation" (*Burrowes v Combs*, 25 AD3d 370, 373 [2006]).

Here, the complaint alleges, in substance, that plaintiff has a valid contract with its merchants; that "[d]efendants had knowledge of the existence and substance of these agreements because they are sales agents who solicited these merchant applications on behalf of [p]laintiff . . . and were privy to its proprietary information;" that defendants wrongfully interfered with plaintiff's merchant agreements by soliciting merchants to board with other processors; and that defendants' conduct was motivated by ill will, which caused breaches with plaintiff's merchant relationships. However, the complaint does not contain any factual allegations that Koam was a sales agent. Rather, the complaint only alleges in conclusory fashion that Koam was the alter ego of Yoo.

Implicitly conceding these deficiencies, plaintiff argues that the court should accept the proposed amended complaint - which adds a new cause of action against Koam for tortious interference with the Agreement - because it *filed* the amended complaint within 20 days after defendants filed their cross motion (*see* CPLR 3025 [a]). However, plaintiff has failed to establish that it *served* the amended complaint within 20 days after defendants filed their cross motion, as permitted under CPLR 3025 [a]). While plaintiff is entitled to serve an amended complaint as of right while defendants' cross motion is pending (CPLR 3211 [f]), plaintiff has failed to demonstrate that it has done so, and thus this statute has not yet become operative (*compare Union State Bank v Weiss*, 65 AD3d 584, 585 [2009]).

In any event, the newly amended cause of action alleges that plaintiff had a valid non-compete/non-solicitation contract with Yoo (the Agreement); that since June or July 2014, Koam had actual or constructive notice of the Agreement, and hired Yoo based upon his performance for plaintiff; and that Koam, motivated by ill will, wrongfully interfered with and caused the breach of the Agreement by, among other things, soliciting plaintiff's merchants, and causing breaches of plaintiff's relationships [sic] with Yoo.

Despite the foregoing, this cause of action fails to state a claim because it does not contain any factual allegations that Koam knew about the Agreement. Moreover, plaintiff does not allege that Yoo would not have breached the Agreement absent Koam's conduct.

Lastly, "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Comprehensive Mental Assessment & Med. Care, P.C. v Gusrae Kaplan Nusbaum, PLLC*, _ AD3d _, 2015 NY Slip Op 05904 [2d Dept 2015] [internal citations and quotation marks omitted]; *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hospital Center*, 59 AD3d 473, 873 [2009] [internal citations and quotation marks omitted])

Here, the complaint alleges that due to defendants' wrongful transfer of plaintiff's merchant accounts to processors other than plaintiff, defendants have and continue to receive payments of residual commissions belonging to it; that defendants have not given these residuals to plaintiff and will continue to retain them; and that defendants' actions are inequitable, would result in their unjust enrichment at plaintiff's expense, and should be prohibited under principles of equity and good conscience.

Despite the foregoing, the complaint lacks any factual support that Koam wrongfully transferred merchant accounts away from plaintiff to itself, and thus, in effect, merely alleges that plaintiff suffered the loss of customers to its competitor (*cf. Spector v Wendy,* 63 AD3d 820, 822 [2009] ["Here, accepting the plaintiffs' allegations as true, they do not establish that the first and second judgments were unlawfully or fraudulently obtained or that, as a matter of equity, [defendant] . . . should disgorge the payments she received under those judgments"]). "The claim for unjust enrichment also fails because no facts are alleged that indicate a relationship between the parties that could have caused reliance or inducement" (*OneBeacon Am. Ins. Co. v Whitman Packaging Corp.*, 123 AD3d 443, 444 [2014]).

[* 24]

As such, the complaint fails to sufficiently allege that Koam was enriched at plaintiff's expense, and that Koam was unjustly enriched.[3]

In light of the foregoing, the cross motion to dismiss is granted and the application of plaintiff for a preliminary injunction is denied.

This constitutes the decision and order of the court.

E N T E R,

Karen B. Rothenberg
J. S. C. Justice, Supreme Court

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[3]To the extent plaintiff argues that Koam is the alter ego of Yoo, and that therefore Koam is a party to the Agreement, plaintiff may not assert a claim of unjust enrichment against Koam, because the "theory of unjust enrichment lies as a quasi-contract claim" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [internal citations and quotations marks omitted]).