| **Pavers & Road Bldrs. Dist. Council Welfare Fund v Briceno** |
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| 2015 NY Slip Op 32415(U) |
| November 21, 2015 |
| Supreme Court, Queens County |
| Docket Number: 704794 2015 |
| Judge: Marguerite A. Grays |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

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| PAVERS AND ROAD BUILDERS DISTRICT COUNCIL WELFARE FUND, APPRENTICESHIP, SKILL IMPROVEMENT AND SAFETY FUND, PENSION FUND and ANNUITY FUND, by their Trustee, FRANCISCO FERNANDEZ, | Index Number 704794 2015 <br> Motion Date August 21, 2015 |
| Plaintiff(s) <br> -against- | Motion Cal. Number 95 |
| MARIO BRICENO, | Motion Seq. No. 1 |
| Defendant(s) | |

The following papers numbered 1 to 8 read on this motion by defendant Mario Briceno for an Order pursuant to CPLR §3211(a)(1) and (7) dismissing the complaint against him.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits | 1 |
| Answering Affidavits - Exhibits | 2-4 |
| Reply Affidavits | 5 |
| Memoranda of Law | 6-8 |

Upon the foregoing papers it is ordered that defendants motion is determined as follows:

I. The Allegations of the Complaint

The plaintiff trust funds provide retirement and other benefits to union members. The plaintiffs derive their assets from employer contributions made for work performed by their employees.

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QUEENS COUNTY

Defendant Mario Briceno worked for the plaintiff funds from 2005 until they terminated his employment in 2014. He performed primarily clerical and administrative duties for the Welfare and Pension Fund and part time training duties for the Training Fund.

During the course of his employment, defendant Briceno had access to the funds' confidential participant data, including participant names, addresses, and telephone numbers. Beginning in 2008, while he still worked full time for the plaintiff funds, Briceno also became an employee of the Local 175 Benefit Funds, a competitor of the plaintiff funds. Briceno attempted to induce participants in the plaintiff funds to instead participate in the Local 175 Benefit Funds.

Before he left the employment of the plaintiff funds in 2014, Briceno physically took or copied Welfare Fund records containing confidential participant data containing the identity, addresses, and phone numbers of more than a thousand participants in the plaintiff funds, information which is not readily available to others. Beginning in March, 2015, Briceno used the information that he had taken from the plaintiff funds to send letters to the homes of participants in the plaintiff funds for the purpose of convincing them to transfer to Local 175 Benefit Funds.

II. CPLR §3211(a)(1)

CPLR §3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1.a defense is founded on documentary evidence***" (*see, Galvan v. 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743). In order to prevail on a CPLR §3211(a)(1) motion, the documentary evidence submitted " must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see, Galvan v. 9519 Third Avenue Restaurant Corp, supra; Fontanetta v. Doe*, 73 AD3d 78; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248).

The third cause of action captioned "For breach of the Duty of Loyalty for Misappropriation of Confidential Trade Secret Information," the fourth cause of action captioned "For Unfair Competition," and the fifth cause of action captioned "For Injunctive Relief" all rest on the premise that the participant lists maintained by the plaintiffs are confidential information.

The participant lists compiled by the plaintiff funds are comparable to customer lists, and authority pertaining to customer lists, which may be trade secrets, is relevant here.

A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it ***" (*Ashland Mgt. v. Janien*, 82 NY2d 395, 407, quoting Restatement of Torts § 757, comment b; *Marietta Corp. v. Fairhurst*, 301 AD2d 734). "The Restatement suggests that in deciding a trade secret claim several factors should be considered: '(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others ****" (*Ashland Management Inc. v. Janien, supra*, 407, quoting Restatement of Torts § 757, comment b; *see, Marietta Corp. v. Fairhurst, supra*). New York case law pertaining to customer lists is in harmony with the Restatement. Where customer lists have been compiled by years of effort and the expenditure of substantial time and money, and the identity of the customers is not readily ascertainable, the customer list may be treated as a trade secret. (*See, Leo Silfen, Inc. v. Cream*, 29 NY2d 387, 392; *Primo Enterprise v. Bachner*, 148 AD2d 350).

Defendant Briceno initially argued that the participant lists are not confidential information because the plaintiff funds and their rival, Local 175, "have been exchanging and filing voluminous documents showing the names and addresses of their contributing employers and participating employees for years in the course of annual Article 78 proceedings disputing the New York Comptroller's determination of which union is the predominant union for asphalt paving in New York City." The documentary evidence initially relied upon by the defendant in support of his CPLR 3211(a)(1) motion consists of exhibits filed in the Article 78 proceedings including at least some names and addresses of participants.

The plaintiffs argued in opposition that the participant lists taken by defendant Briceno include confidential information not disclosed in those court documents such as home addresses, telephone numbers, and names of spouses.

To rebut the plaintiffs' argument, the defendant submitted reply papers which included (1) documents showing the names and addresses of 506 participants in the Pavers Welfare Fund which were filed in 2011 by the Pavers Funds with the US District Court for the Eastern District of New York in a case captioned *Palumbo v. Fasulo* (Docket No. 07-CV-797); (2) documents filed by the Pavers Funds in *Palumbo v. Fasulo* which also included telephone numbers of participants, and (3) documents showing participants' phone numbers filed in 2014 by the Pavers Funds' sponsor, Local 110, in an Article 78 proceeding. The

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defendant's attorney notes in her reply memorandum of law: " Even though there was a confidentiality order on file in the Palumbo action, which permitted the Pavers Funds to designate documents as confidential by simply labeling them as confidential, <u>the Pavers Funds did not mark the participant names, home addresses, home telephone numbers and spouses' name confidential.'</u> (Reply memorandum, p3 [emphasis in original].)

Faced with the convincing documentary evidence produced by the defendant in reply, the plaintiffs brought a motion (sequence number "2") to strike the reply papers on the ground that they introduced new evidence. The court denied the motion. (See motion sequence number "2").

The defendant is entitled to an order pursuant to CPLR §3211(a) (1) dismissing the third, fourth, and fifth causes of action. The documentary evidence in this case, which shows that the names of participants, their spouses' names, the participants' addresses, and the participants' telephone numbers are not confidential information, "conclusively and definitively" disposes of the plaintiffs' third, fourth, and fifth causes of action. (*See*, *Fernandez v. Cigna Property and Casualty Insurance Company, supra).* "[A] trade secret must first of all be secret ***" (*Ashland Mgmt. Inc. v. Janien*, supra, 407). The plaintiff funds freely disclosed their purported confidential information in numerous court filings.

<u>III. CPLR §3211(a)(7)</u>

<u>A. The First Cause of Action</u>

The plaintiffs allege that defendant Briceno breached a duty of loyalty owed to them by working for a competitor while they also employed him.

An employee owes a fiduciary duty to his employer (*see*, *W. Elec. Co. v. Brenner*, 41 NY2d 291; *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536 ["New York law establishes that an employee-employer relationship is fiduciary']; 52 NYJur2d, "Employment Relations," §228). Under New York Law, all employees owe a fiduciary duty to their employers regardless of their rank and the level of there positions. (*Base One Technologies, Inc. v. Ali*, 78 F. Supp. 3d 186; *Fairfield Fin. Mortgage Grp., Inc. v. Luca*, 584 F. Supp. 2d 479).

"[A]n employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties ***. An employee owes his or her employer undivided and unqualified loyalty and may not act in any manner contrary to the interests of the employer ***" (*Qosina Corp. v. C & N Packaging, Inc.*, 96 AD3d 1032, 1033 [internal

quotation marks and citations omitted]). "It is settled law that an employee is prohibited from acting in any manner inconsistent with his or her employment and must exercise good faith and loyalty in performing his or her duties ***" (*Chemfab Corp. v. Integrated Liner Technologies Inc.*, 263 AD2d 788, 789; *see, Mega Group Inc. v. Halton*, 290 AD2d 673).

The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary duty, misconduct by the defendant fiduciary, and damages that were directly caused by the defendant's misconduct. (*In re JPMorgan Chase Bank, N.A.*, 122 AD3d 1274; *McGuire v. Huntress*, 83 AD3d 1418).

The first cause of action is adequately stated.(*See*, *Qosina Corp. v. C & N Packaging, Inc.*, *supra*). An employee may not use his employer's time, facilities or proprietary secrets to build a competing business (*Mega Grp. Inc. v. Halton*, *supra*). The complaint alleges misconduct by Briceno in that "he attempted to induce participants in the plaintiff funds to abandon the plaintiff funds and instead become participants in the Local 175 Funds ***." Whether Biceno did work for Local 175 Funds at his job with the plaintiff funds and whether he diverted opportunities that belonged to the plaintiff funds to a competitor (*see*, *Alexander & Alexander of New York, Inc. v. Fritzen*, 147 AD2d 241) are matters for discovery. Moreover, damages attributable to Briceno's alleged breach of fiduciary duty may reasonably be inferred from the allegations of the complaint (*see*, *Qosina Corp. v. C & N Packaging, Inc.*, *supra*).

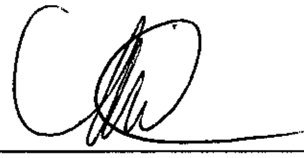
B. The Second Cause of Action

The second cause of action is adequately stated."It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The second cause of action alleges that defendant Briceno breached the duty of loyalty owed to his employer by physically taking or copying the records of the plaintiff funds. "The use of information about an employer's customers which is based on casual memory is not actionable ***" (*Levine v. Bochner*, 132 AD2d 532, 533; *Island Sports Physical Therapy v. Kane*, 84 AD3d 879). However, the physical taking or copying of customer lists by an employee is actionable. "Solicitation of an entity's customers by a former employee or independent contractor is not actionable unless the customer list could be considered a trade secret, or there was wrongful conduct by the employee or independent contractor, such as physically taking or copying files or using confidential information ***" (*Starlight Limousine Serv., Inc. v. Cucinella*, 275 AD2d 704, 705; *Island Sports Physical Therapy v. Kane*, 84 AD3d 879; *DK Fabrications, Ltd. v. Blaszczynski*, 41 Misc3d 1205[A]; *see, Leo Silfen, Inc. v. Cream*,

29 NY2d 387, 391-92. ["If there has been a physical taking or studied copying, the court may in a proper case enjoin solicitation, not necessarily as a violation of a trade secret, but as an egregious breach of trust and confidence while in plaintiffs' service."]; *Marcone APW, LLC v. Servall Co.*, 85 AD3d 1693 [whether or not customer information was entitled to trade secret protection, record showed that defendants, in breach of trust, stole or improperly retained employer's documents]).

Accordingly, the branch of the defendants motion which seeks an Order pursuant to CPLR §3211(a)(1), dismissing the complaint against the defendant, is granted as to the third, fourth, and fifth causes of action. The branch of the motion which is for an Order pursuant to CPLR §3211(a)(7), dismissing the complaint against the defendant is denied as to the first and second causes of action and denied as moot as to the third, fourth, and fifth causes of action.

Dated: NOV 21 2015



J.S.C.

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