NBTY, Inc. v Piping Rock Health Prods., LLC
2015 NY Slip Op 32839(U)
September 18, 2015
Supreme Court, Suffolk County
Docket Number: 604639-15
Judge: Elizabeth H. Emerson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO.: 604639-15

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 5-21-15; 7-30-15
SUBMITTED: 7-16-15; 7-30-15
MOTION NO.: 001-MD
002-MG
005-MOT D

---x

NBTY, INC.,

Plaintiff,

-against-

PIPING ROCK HEALTH PRODUCTS, LLC, MICHAEL S. MCNAMARA, and JAMES SZCZESNY,

Defendants.

---x

LATHAM & WATKINS LLP
Attorneys for Plaintiff
885 Third Avenue
New York, New York 10022

JASPAN SCHLESINGER LLP
Attorneys for Defendants
300 Garden City Plaza
Garden City, New York 11530

Upon the following papers numbered 1-36 read on this motions seeking a preliminary injunction, sealing of confidential document, and to dismiss the complaint ; Notice of Motion/Order to Show Cause and supporting papers 1-5, 22-25, 26-32 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 6-21, 33-35 ; Replying Affidavits and supporting papers 36 ; it is,

ORDERED that the plaintiff's motions (001, 002) and defendants' motion (005) are consolidated for the purpose of this determination; and it is further

ORDERED that the plaintiff's motion (001) seeking a preliminary injunction against defendants is denied; and it is further

ORDERED that the plaintiff's motion (002) seeking an order to file a confidential exhibit under seal is granted unopposed; and it is further

ORDERED that the defendants' motion (005) seeking an order dismissing the complaint is granted to the extent that the fourth cause of action is dismissed; and it is further

ORDERED that the defendants are directed to serve their answers pursuant to CPLR 3211 (f); and it is further

ORDERED that the parties are directed to appear at a status conference in Supreme Court, Part 44, at 210 Center Drive, Riverhead, New York on Thursday, November 19, 2015 at 10:00 a.m.

In this breach of contract action, plaintiff seeks damages from defendants on the ground that defendants took clients and an allegedly confidential spreadsheet in order to compete with plaintiff. Plaintiff discovered emails between defendant Michael McNamara ("McNamara") and defendant James Szczesny ("Szczesny"), an employee of defendant Piping Rock Health Products, LLC ("Piping Rock") and commenced the instant action on May 1, 2015.

The complaint alleges that McNamara emailed a list containing 41 of plaintiff's clients and other information to Szczesny while still employed with plaintiff, and shortly thereafter was hired by Piping Rock. The complaint further alleges that McNamara, who was employed as a Regional Manager of plaintiff, violated a non disclosure agreement which he signed in 2005, and violated a confidentiality and non-disclosure policy in the company employee handbook, which prohibited the disclosure of confidential information. The complaint contains six causes of action: misappropriation of trade secrets, unfair competition, breach of contract, breach of fiduciary duty, tortious interference with prospective economic advantage, and unjust enrichment.

Plaintiffs now move (001) for a preliminary injunction and also move (002) for an order sealing Exhibit F in the Court's E-Filing System. Defendants move (005) pursuant to CPLR 3211 (a) (7) to dismiss the complaint on the ground that the complaint fails to state a cause of action.

In reviewing plaintiff's motion for a preliminary injunction, an injunction will generally not be awarded unless the activity sought to be restrained is actionable, that the injunction issued is reasonably suited to abate such activity, and where the plaintiff's right is clear and the wrong is manifest (**Sysco Corp. v Maines Paper & Food Serv.**, 254 AD2d 611). At this time, plaintiff has failed to meet its burden with respect to its request for injunctive relief. Therefore, the motion is denied.

Turning to plaintiff's motion to seal Exhibit F in the Court's E-Filing system by e-filing a redacted customer list and placing an unredacted customer list under seal, plaintiff adheres to its belief that the customer list is a trade secret and should be kept confidential. The court has the discretion to seal a record for good cause shown pursuant to 22 NYCRR § 216.1. The motion is unopposed. Therefore, in the court's discretion and prior to determining whether this list qualifies as a trade secret, the motion is granted.

Turning to defendants' motion to dismiss, in support, defendants submit among other things, the pleadings, the personal affidavit of Albert Anastasi, Vice President of Sales and Marketing for Piping Rock, a copy of Exhibit F, and other documents.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), on the ground that the complaint fails to state a cause of action, the Court is limited to examining the pleading to determine whether it states a cause of action (**Guggenheimer v Ginzburg**, 43 NY2d 268). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (**Board of Education v State Education Dep't**, 116 AD2d 939, *later proc* 135 AD2d 903). Thus, on such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (**Leon v Martinez**, 84 NY2d 83). Only affidavits submitted by the plaintiff in support of the causes of action may be considered on a motion of this nature (**Rovello v Orofino Realty Co.**, 40 NY2d 633, 389 NYS2d 314). Therefore, under these circumstances, the court rejects the affidavit of Albert Anastasi on behalf of defendants.

Turning to that branch of the motion to dismiss the first cause of action alleging misappropriation of trade secrets, the complaint alleges that defendants are using the information found on the spreadsheet called "Exhibit F" which McNamara emailed to Szczesny. In addition, the complaint alleges that this information is a trade secret inasmuch as it contained confidential sales and customer preferences which was not available to the public. In support of the motion, defendants contend that the list of clients did not contain any confidential information. Defendants further state that the list was comprised of publicly available information and McNamara's recollections and not subject to trade secret protection. Defendants claim that the same information is available on several web sites which provide detailed sales data, and that the customers on the list are widely known within the nutritional supplement industry. Defendants seek judicial notice of the existence of this information on the internet.

In determining whether a trade secret exists, 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 Mgmt. v Janien**, 82 NY2d 395, 407). The existence of a trade secret is generally a question of fact (**Big Vision Private, Ltd. v. E.I. Dupont De Nemours & Co.**, 1 FSupp3d 224, 267). Here, upon viewing the complaint in the light most favorable to plaintiff, the court finds that the first cause of action was sufficiently stated. In addition, the court declines to take judicial notice of the facts defendants contend exist on the internet on the ground that these facts do not have sufficient notoriety to make it proper to asume their existence without proof (**Dollas v Grace**, 225 AD2d 319, 320, quoting **Ecco High**

Frequency Corp. v Amtorg Trading Corp., 81 NYS2d 610, 617, *affd* 274 App Div 982). Thus, the motion to dismiss the first cause of action is denied.

Turning to that branch of the motion to dismiss the second cause of action which alleges unfair competition by all defendants, an employee's illegal physical taking or copying of an employer's files or confidential information constitutes actionable unfair competition (see, **Leo Silfen, Inc. v Cream**, 29 NY2d 387, 391-392; **Continental Dynamics Corp. v Kanter**, 64 AD2d 975; see also, **Levine v Bochner**, 132 AD2d 532; **Advanced Magnification Instruments, Ltd. v Minuteman Optical Corporation**, 135 AD2d 889). In general, in a claim for unfair competition, the complaint must allege the bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets (**Eagle Comtronics, Inc. v Pico Prods., Inc.**, 256 AD2d 1202, 1203). Here, the complaint alleges that the McNamara's behavior of emailing a document from company files demonstrates bad faith and an intent to use the information to plaintiff's disadvantage. In support of the motion, defendants contend that the information which was taken by McNamara did not consist of trade secrets and there is no allegation that defendants acted with the sole purpose of harming plaintiff. In addition, defendants state that the information is not proprietary and that there is widespread information regarding these customers on the internet. The court finds that, in viewing the cause of action in the light most favorable to the plaintiff, that the second cause of action was adequately stated. Thus, the motion to dismiss the second cause of action is denied.

Turning to that branch of the motion to dismiss the third cause of action, a complaint adequately states a cause of action for breach of contract when it alleges (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) damages as a result of the breach (**JP Morgan Chase v J.H. Electric of N.Y., Inc**., 69 AD3d 802). The complaint alleges that McNamara executed a restrictive covenant in 2005 and that McNamara breached the agreement. While the defendants may refute the factual allegations, the allegations set forth are clearly sufficient to state claims under the general category of breach of contract. Thus, the motion to dismiss the third cause of action is denied.

Turning to that branch of the motion to dismiss the fourth cause of action, alleging a breach of fiduciary duty by McNamara, such a claim cannot survive when it is premised upon allegations substantially identical to a pled claim for breach of contract (**William Kaufman Org., Ltd. v Graham & James LLP**, 269 AD2d 171). Accordingly, the fourth cause of action is dismissed.

Turning to that branch of the motion to dismiss the fifth cause of action, alleging tortious interference with a prospective economic economic advantage against all defendants, under New York law, "the plaintiff must allege that it had a business relationship with a third party, that the defendant knew of that relationship and intentionally interfered with it, that the defendant acted solely out of malice, or used dishonest, unfair, or improper means, and that the defendant's interference caused injury to the relationship" (**Kirch v Liberty Media Corp.**, 2449 F.3d 388,

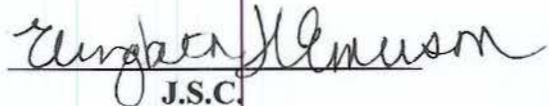
[* 5]

400). In the complaint, plaintiff alleges that McNamara stole a client list with the intention of using it in his new employment to contact the clients and induce them to order Piping Rock's products. At this stage of the litigation, accepting the allegations as true, the Court finds that plaintiff has set forth causes of action for tortious interference with existing and future contracts based on allegations that go far beyond those for breach of contract. Thus, the motion to dismiss the fifth cause of action is denied.

Turning to that branch of the motion to dismiss the sixth cause of action, alleging unjust enrichment, New York law provides that the defendant was enriched at plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (**Robertson v Wells**, 95 AD3d 862). Although defendants argue that this cause of action must be dismissed as duplicative of the breach of contract claim, such is not the case. Where there is a bona fide dispute as to the existence of a contract plaintiff may proceed upon a theory of quasi contract and breach of contract and will not be required to elect its remedies. **Plumitallo v Hudson Atlantic Land Co.,** 74 AD3d 1038); **AHA Sales, Inc. v Creative Bath Prods., Inc.,** 58 AD3d 6). Moreover, it is well settled that a plaintiff may plead both breach of contract and unjust enrichment claims in the alternative (see, e.g., **Auguston v Spry**, 282 AD2d 489). Thus, the motion to dismiss the sixth cause of action is denied.

Accordingly, the motion to dismiss the complaint is granted to the extent that the fourth cause of action is dismissed.

Dated: September 18, 2015



J.S.C.

ELIZABETH H. EMERSON