SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

ADVANSTAR COMMUNICATIONS, INC.,

Plaintiff,

-against-

ANDREW POLLARD, NANCY BERGER, RACHEL ZIMMERMAN, EITAN BRAHAM, GLOBAL APPAREL NETWORK, LTD. and GLOBAL APPAREL NETWORK, INC.

Defendants.

ANDREW POLLARD, RACHEL ZIMMERMAN, and EITAN BRAHAM,

Counterclaim Plaintiffs,

-against-

ADVANSTAR COMMUNICATIONS, INC.

Counterclaim Defendant

-and-

JOSEPH LOGGIA,

Additional Counterclaim Defendant.

Index No.: 652153/2012

Mtn Seq. No. 013

DECISION AND ORDER

JEFFREY K. OING, J.:

Defendants Andrew Pollard ("Pollard"), Global Apparel Network, Ltd. ("GAN, Ltd."), and Global Apparel Network, Inc. ("GAN, Inc.") (collectively, "GAN") move, pursuant to CPLR 3212, for summary judgment dismissing the amended Complaint.

Background

Plaintiff, Advanstar Communications, Inc. ("ACI"), commenced this contract action against a group of its former employees, including defendants Pollard, Nancy Berger ("Berger"), Rachel Zimmerman ("Zimmerman"), and Eitan Braham ("Braham"), and against GAN, seeking to recover damages following the departure of the individual defendants from Advanstar to join GAN, which Advanstar claims is a direct competitor.

Advanstar creates business-to-business marketplaces in the fashion industry. It produces such trade shows as the MAGIC Marketplace ("MAGIC"), a live, multi-city event that includes PROJECT, a three-day fashion industry trade show. PROJECT is held four times per year, twice in Las Vegas and twice in New York. Pollard and Berger served as president and marketing officer of PROJECT, respectively.

GAN operates an online business-to-business marketplace, Visuality 365 Marketplace ("Visuality'"). GAN describes Visuality as a new way to showcase, share, and participate in a 365-day trade show, and promotes Visuality as an online trade show.

In 2011, GAN tried unsuccessfully to negotiate a business relationship with, or acquisition by, Advanstar. Thereafter, Pollard, Berger, Zimmerman, and Braham all left Advanstar and went to work for GAN.

Advanstar alleges that it has developed and protected a wealth of trade secret and competitively sensitive information concerning MAGIC and PROJECT, and that it hired Pollard because of his unique talents in the industry. In fact, Pollard signed an offer letter, dated April 22, 2010, agreeing that during his employment with Advanstar and for 12 months thereafter, he would not:

> (i) own, manage, operate, control, render services for, or otherwise be associated or affiliated with any exhibition, trade show, publication, website, conference or other event and/or related product or service (whether in print, electronic or any other media) anywhere in North America which is related or otherwise pertains to apparel, fashion, footwear, accessories or related retail products or services or is otherwise competitive with any aspect of the Company's apparel and fashion business or Fashion Group properties (including, without limitation, the business of marketing, selling, producing and operating (x) the trade show events known as *MAGIC Marketplace* ("MAGIC") and *Project New York and Project Las Vegas* ("Project"); (y) the website www.projectshow.com associated with the Project trade show events; and (z) the publications, websites and other ancillary products and services associated with MAGIC or Project); or (ii) contact, recruit, solicit or induce, or attempt to contact, recruit, solicit or induce, or hire or participate in the hiring of, and employees, consultant, agent, director, or officer of the Company; or (iii) contact, solicit, divert, take away, or attempt to contact, solicit, divert or take away, or do business with, any exhibitors, sponsors, advertisers, attendees or other clients, customers or accounts, or prospective clients, customers or accounts. The restriction set forth in this paragraph includes, but is not limited to, those customers, clients and accounts, and prospective customers, clients or accounts, and prospective customers, clients or accounts, with whom you have

> contact or do business during your employment with the Company.

(Letter Agreement, Pollard Aff., Ex. 1).

Advanstar also asserts that GAN secretly orchestrated hiring Pollard, who left to become CEO of GAN, and that Pollard actively recruited Berger, Zimmerman, and Braham to join GAN. Advanstar further claims that the individual defendants used their positions to access its valuable, confidential information and trade secrets prior to joining GAN. Advanstar offers numerous emails and other documents to support its claim that defendants transferred confidential information and trade secrets from its computers to portable hard drives and flash drives, and then used the information and trade secrets to benefit GAN and compete directly with Advanstar.

In its amended Complaint, Advanstar alleges that Pollard's actions violate the contractual non-solicitation and confidentiality agreement he accepted in exchange for his employment with Advanstar (count one), the implied duty of good faith and fair dealing (count two), and a fiduciary duty to Advanstar (count three). Advanstar also alleges that defendants competed unfairly by, among other things, soliciting Advanstar's fashion marketplace exhibitors and attendees, exploiting defendants' access to Advanstar's confidential information, and taking advantage of Advanstar's relationships with its exhibitors and attendees (count four). Advanstar further alleges that

defendants misappropriated its property (count five); that GAN tortiously interfered with the agreement between Advanstar and Pollard (count six); that GAN aided and abetted Pollard's breach of fiduciary duty to Advanstar (count seven); and that defendants have been unjustly enriched by their wrongful actions (count eight).

DISCUSSION

The principle is well established that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (Id.).

In determining a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party (Stukas v Streiter, 83 AD3d 18, 22 [2d Dept 2011]). Summary judgment is a drastic remedy which should only be employed when

there is no doubt as to the absence of triable issues (Andrew v Pomeroy, 35 NY2d 361, 364 [1974]).

The elements of a cause of action for breach of contract are (1) the formation of a contract between plaintiff and defendant; (2) performance by plaintiff, (3) defendant's failure to perform; and (4) resulting damages (Furia v Furia, 118 AD2d 694, 695 [2d Dept 1986]). Advanstar essentially claims that Pollard breached the non-solicitation, non-competition, and confidentiality provisions of his employment agreement by raiding Advanstar's employees and information in order to target Advanstar's customers and steer business away from it to benefit GAN.

Defendants maintain that they are entitled to judgment as a matter of law because plaintiff cannot show that Pollard breached the cited covenants in his agreement with Advanstar. Defendants deny the allegation that Pollard or any of the other defendants solicited employees or customers from Advanstar. Defendants also contend that Advanstar's live trade shows do not compete with GAN's online marketplace, and that, in fact, the two enterprises complement each other. Defendants further argue that Advanstar fails to identify any proprietary information or trade secrets that Pollard took when he left Advanstar, or used to GAN's competitive advantage. In addition, defendants argue that Advanstar does not identify any actual damages flowing from the alleged breach of contract.

Contrary to defendants' assertion, an issue of fact exists as to whether Pollard's duties at GAN, which creates an online marketplace, are barred by the extensive language set forth in his non-competition clause with Advanstar, which produces live trade shows. A triable issue of fact also exists as to whether Pollard solicited Advanstar's employees and customers. In his affidavit, Pollard acknowledges meeting with Joseph Shohfi ("Shohfi"), GAN's CEO, on April 6, 2012, to discuss hiring Berger to work at GAN, and discussing with Berger that GAN was interested in hiring her (Pollard Aff., at 6-7). Pollard also admits providing Advanstar customer lists, including the names of brand customers, the amount of square footage rented by the brands at previous trade shows, the net revenue received from the brands, the square foot yield, to Berger after she went to work for GAN (Id. at 8). He further concedes that he and Shohfi exchanged emails of his list of top 500 brand contacts, and a spreadsheet of brand names and company tiered information (Id. at 10, 11).

Similarly, a question of fact exists as to whether the documents that Pollard exchanged with GAN constitute confidential information or trade secrets. A trade secret is defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know how to use

it" (Ashland Mgt. v Janien, 82 NY2d 395, 407 [1993]). In deciding a trade secret claim, the Court should consider (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 security 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; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others (Id.). Whether a trade secret is a secret is generally a question of fact (Id.). Here, I cannot conclude as a matter of law that Advanstar's compiled client lists, and other client personal information, are not confidential information or trade secrets safeguarded by Advanstar.

Defendants' assertion that Advanstar does not demonstrate actual damages as a result of the alleged breach of the agreement is insufficient to establish entitlement to judgment as a matter of law. In response to defendants' interrogatories, Advanstar identifies as damages (1) the compensation received by defendants from Advanstar since the first date of their disloyalty, including $591,423 to Pollard dating back to May 2011; (2) all revenues received by GAN as a result of defendants' disloyalty; (3) all current and future profits lost by Advanstar as a result

of defendants' disloyalty; (4) reasonable royalty based upon information that defendants misappropriated from Advanstar; (5) punitive damages based on defendants' misconduct, and (6) all applicable interest, costs and attorneys' fees authorized by the Court (Response to Interrogatories, Serbgai Affirm., Ex. 20). Advanstar also argues that it lost approximately $150,000 since 2012, when three of its brands opted to contract with GAN.

Further, contrary to defendants' position, Advanstar need not prove the amount of damages with certainty (V.S. Intern., S.A. v Boyden World Corp., 1993 WL 59399 [SD NY 1993]). Given that defendants have not established as a matter of law that Advanstar did not suffer any damages, the issue must be resolved by the trier of fact (Fundamental Portfolio Advisors, Inc. V Tocqueville Asset Mgt., L.P., 7 NY3d 98, 107 [2006]).

Accordingly, that branch of the motion seeking summary judgment dismissing the breach of contract claim (count one) is denied.

Implicit in every contract is a covenant of good faith and fair dealing, which encompasses any promise that a reasonable promisee would understand to be included (Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995]). The covenant embraces a pledge that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract (Id.). The record

demonstrates that factual issues exist as to this claim given that Pollard's conduct with respect to the breach of contract claim is also at the heart of this claim.

Accordingly, that branch of the motion for summary judgment dismissing the claim for breach of the covenant of good faith and fair dealing (count two) is denied.

Advanstar also claims that Pollard breached his fiduciary duty by taking and using its confidential and proprietary information to compete directly with Advanstar; by disclosing Advanstar's confidential and proprietary information to GAN; by soliciting the other individual defendants to resign from Advanstar and join GAN; and by deleting information from his Advanstar-issued computer to hide evidence of his misconduct.

The claim for breach of fiduciary duty, however, must be dismissed as it is not based upon the breach of any fiduciary duty independent of the agreement between Advanstar and Pollard (Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., 85 AD3d 680 [1st Dept 2011]). The claim for aiding and abetting breach of fiduciary duty must also be dismissed, as an underlying breach of fiduciary duty is a required element of an aiding and abetting breach of fiduciary duty claim (Kaufman v Cohen, 307 AD2d 113, 125 [1st Dept 2003]).

Accordingly, that branch of the motion for summary judgment dismissing the claim for breach of fiduciary duty (count three)

and for aiding and abetting that breach (count seven) is granted, and they are dismissed.

Advanstar claims that defendants competed unfairly with it by, among other things, soliciting Advanstar's fashion marketplace exhibitors and attendees, exploiting defendants' access to Advanstar's confidential information, and taking advantage of Advanstar's relationships with its exhibitors and attendees.

Under New York law, an unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property (ITC Ltd. v Punchgini, Inc., 9 NY3d 467, 478 [2007]).

In seeking summary judgment, defendants argue that there are no allegations or evidence that defendants used Advanstar's confidential information in their new positions to gain commercial advantage over Advanstar. The record is to the contrary. Triable issues of fact exists as to whether Pollard wrongfully removed Advanstar's client information and other confidential information resulting in damages to Advanstar. The record also includes Advanstar's customer lists that Pollard sent to Berger after she left Advanstar to work for GAN (Pollard Aff., Ex. 3). In addition, Zimmerman and Braham acknowledge copying documents belonging to Advanstar from Advanstar's computers to a

personal hard drive after they decided to resign from Advanstar and join GAN, that some of the copied documents included non-public Advanstar information, and that they transferred the information to GAN computers (Consent Judgment and Stipulation, dated September 18, 2013).

Accordingly, that branch of the motion seeking summary judgment dismissing the claim for unfair competition (count four) is denied.

In count five, Advanstar claims that defendants intentionally and wrongfully misappropriated Advanstar's property, including, among other things, its confidential and proprietary business information. A cause of action for misappropriation of confidential or proprietary information generally applies to cases where former employees actually use the confidential or proprietary information (Zeno Group, Inc. v Wray, 2008 WL 4532826 [Sup Ct, NY County 2008]).

Here, Pollard's acknowledgment that he shared Advanstar's information with Berger at GAN raises triable issues of fact as to whether defendants used Advanstar's confidential or proprietary information (Zylon Corp. v Medtronic, Inc., 137 AD3d 462 [1st Dept 2016]).

Accordingly, that branch of the motion seeking summary judgment dismissing the misappropriation claim (count five) is denied.

As to the claim for tortious interference with contract, given the determination that triable issues of fact exist as to whether Pollard breached his agreement with Advanstar, Pollard's acknowledgment that he provided Advanstar's customer lists and other documents to Berger after she began working for GAN, and Advanstar's claim of damages resulting from defendants' actions, triable issues of fact exist concerning this claim (Oddo Asset Mgt v Barclays Bank PLC, 19 NY3d 584, 594 [2012]).

Accordingly, that branch of the motion for summary judgment dismissing the tortious interference with contract claim (count six) is denied.

Advanstar's unjust enrichment claim is indistinguishable from the claim for breach of contract and is dismissed as duplicative of the contract claim (Jeffers v American Univ. of Antigua, 125 AD3d 440, 443 [1st Dept 2015]).

Accordingly, that branch of the motion for summary judgment dismissing the unjust enrichment claim (count eight) is granted, and it is hereby dismissed.

Accordingly, it is

ORDERED that the motion is granted to the extent that the claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment are severed and dismissed, and the motion is otherwise denied; and it is further

ORDERED that the action shall continue as to the claims for breach of contract, breach of the covenant of good faith and fair dealing, unfair competition, misappropriation, and tortious interference with contract claim; and it is further

ORDERED that counsel are directed to appear for a pre-trial conference in Part 48 on December 12, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/22/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.