McKinnon Doxsee Agency, Inc. v Gallina
2016 NY Slip Op 32766(U)
December 14, 2016
Supreme Court, Nassau County
Docket Number: 022005-07
Judge: Timothy S. Driscoll

[* 1]

SUPREME COURT-STATE OF NEW YORK
DECISION AND ORDER AFTER TRIAL
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MCKINNON DOXSEE AGENCY, INC. &	**NASSAU COUNTY**
MILLENNIUM ALLIANCE GROUP, LLC,	
Plaintiffs,	**Index No: 022005-07**
-against-	
FRANK G. GALLINA, DANIEL MARKLIN,	
A.C. EDWARDS FINANCIAL SERVICES, LLC,	
Defendants.	
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This action arises from the Plaintiffs' claims that Defendants Frank G. Gallina and Daniel Marklin wrongfully appropriated numerous insurance accounts from Plaintiffs. The following claims were the subject of a bench trial before the Court, following the Court's decision and order dismissing the other causes of action in the Plaintiff's Second Amended Verified Complaint: 1) conversion, 2) breach of fiduciary duty, 3) aiding and abetting breach of fiduciary duty, 4) request for an accounting, and 5) unfair competition.[1] As explained in more detail below, the Court concludes that Plaintiffs have not established any of their claims by a preponderance of the evidence.

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[1]Defendant A.C. Edwards Financial Services, LLC ("Edwards") is no longer a party to the action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Millenium Alliance Group, LLC ("Millenium") was established in 1998 as a joint venture between various insurance agencies, including Plaintiff McKinnon Doxsee Agency, Inc. ("McKinnon Doxsee"). James McKinnon is the sole shareholder and CEO of McKinnon Doxsee. In turn, McKinnon Doxsee owns 70% of Millenium, with the remaining 30% equally owned by James McKinnon, James Kerin and Robert Feuchster.

Defendants Frank Gallina and Daniel Marklin have worked in the insurance business since 1978. They were each employed by an agency named MRW Group, Inc. ("MRW") until 1993, with Gallina beginning employment there in 1983 and Marklin in 1987. During the course of their employment with MRW, Gallina and Marklin developed a book of business of which they owned 50% and MRW owned 50% (the "Gallina-Marklin book"). This meant that, while a customer was free to work with any agency that the customer might choose, both MRW and Gallina/ Marklin had equal access to those customers' information and equal right as MRW to compete for their business.

In September 1993, Defendants left MRW to work for McKinnon Doxsee. They did not, however, sign any employment agreement with McKinnon-Doxsee, much less a non-compete agreement or restrictive covenant. At the time they began their employment at McKinnon Doxsee, Defendants believed that they would become shareholders of that entity after 18 months (*i.e.* by 1995), and thereafter would take full ownership of the agency upon McKinnon's retirement at age 65. At that same time, MRW sold its 50% interest in the Gallina-Marklin book to McKinnon Doxsee for $258,468.24. Gallina and Marklin retained their previously-existing 50% interest in that book, as set forth in the agreement by which MRW sold its assets to

McKinnon Doxsee, which was also executed by Gallina and Marklin which provided that: "The remaining half interest in said customer list and accounts is the property of FRANK GALLINA, as to certain of the accounts, and to DAN MARKLIN as to the remaining accounts." Gallina and Marklin then went to work for McKinnon Doxsee.

In addition, the parties executed a handwritten agreement dated September 1, 1993, referred to by the parties as the "Danford's Agreement." The Danford's Agreement provided as follows:

> In the event that an agreement between Messrs. Gallina and Marklin and McKinnon Doxsee, Inc. is not consummated it is agreed that Gallina and Marklin will be free to take ownership and possession of all files purchased from MRW upon their assumption in total of McKinnon Doxsee's actual or assumed financial responsibilities to MRW as reimbursement to McK-D of all monies paid to MRW to date.

McKinnon formed Millenium in 1998, ostensibly to centralize administrative functions and eliminate duplicate jobs. Its formation, however, effectively thwarted Gallina and Marklin's attempt to acquire a full ownership interest in McKinnon Doxsee pursuant to the opportunity that they believed McKinnon had promised them. In addition, shortly after forming Millenium, McKinnon reduced Gallina and Marklin's commissions. There were also difficulties between and among the personnel at Millenium, making it an unpleasant work environment for Gallina and Marklin. Nevertheless, McKinnon Doxsee continued to pay the overhead and expenses associated with Gallina and Marklin's business. These expenses included an expense allowance, telemarketing, marketing, servicing of accounts, back office assistance, telephones and office space.

In 2000, Gallina was named a "member" of the "Board of Directors" of Millenium.

Ronald Goldman, an attorney who prepared the corporate documents for Millenium, including the resolution naming Gallina to the "Board of Directors" testified that it "does not matter" what the management structure at Millenium was called. Regardless, the Court credits Gallina's testimony that he did not have any managerial or oversight responsibility at Millenium or McKinnon Doxsee.

Discussions continued between McKinnon, Gallina and Marklin about a method by which Gallina and Marklin could acquire an ownership interest in McKinnon Doxsee or Millenium. Eventually, in 2007, a plan was developed by an expert retained by McKinnon that, Gallina and Marklin believed, would provide them only with a minority interest in Millenium, rather than owning their own agency. Gallina and Marklin then decided to leave McKinnon Doxsee. They prepared resignation letters, which were eventually presented to McKinnon on December 4, 2007. In addition to resigning his employment, Gallina acknowledged in his letter that he was tendering his resignation "as a board member of the Board of Directors of [Millennium], effective immediately."

Following their resignation, Gallina and Marklin began contacting their prior customers in the Gallina-Marklin book, both in person and by letter, to advise the customers that they were moving to a new agency, Edwards & Company. Gallina and Marklin also requested that these customers authorize moving their business to Edwards and sign "broker of record" letters directing the carrier to recognize a new broker. If these customers did sign such a letter, the insurance carrier would notify McKinnon Doxsee and/or Millenium to permit those agencies to obtain a countermanding broker of record letter. If, in turn, the customer signed a countermanding broker of record letter, the account would remain with McKinnon Doxsee and/or

Millenium as the original broker of record. It is that sequence of events that gives rise to the matter before the Court. Nevertheless, it is undisputed that customers are not the "property" of an insurance broker, but rather have the ability to choose their broker at any time.

There was no credible evidence that Gallina and/or Marklin converted any of Plaintiffs' business or accounts to their own use while Gallina and Marklin were employed by McKinnon Doxsee. Finally, while Gallina and Marklin obtained from their own work computers the contact information for the customers in the Gallina-Marklin book, there was no credible evidence that they altered or destroyed any information stored on their individual work computers or on any other computer or data storage of McKinnon Doxsee or Millennium. In short, Plaintiffs had the information necessary and the opportunity to contact any customers that had already freely determined to move their accounts to Gallina and Marklin in their new agency, and thus had the opportunity to try to keep those customers.

The law applying to Plaintiffs' claims is essentially not in dispute. That law, and the Court's analysis of how the law applies to the facts adduced at trial, is set forth below.

Conversion

To establish a cause of action to recover damages for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an authorized dominion over the thing in question to the exclusion of plaintiff's rights. *Korsinsky v. Rose*, 120 A.D.3d 1307, 1309 (2d Dept. 2014), citing *Messiah's Covenant Community Church v. Weinbaum*, 74 A.D.3d 916, 919 (2d Dept. 2010), quoting *Independence Discount Corp. v. Bressner*, 47 A.D.2d 756, 767 (2d Dept. 1975).

Here, Plaintiffs did not establish the necessary elements of conversion because Defendants' copying of the information from Plaintiffs' computers did not interfere with McKinnon Doxsee and/or Millennium's continued access to the same information. Moreover, both McKinnon Doxsee and/or Millenium, as well as Defendants, had an equal right to the information. In sum, there was no credible evidence before the Court that Plaintiffs had a superior right of possession to the customer information at issue, or that the Defendants used that information to the exclusion of the Plantiffs.

Breach of Fiduciary Duty

The elements of a claim for breach of fiduciary duty are: 1) existence of a fiduciary relationship, 2) misconduct, and 3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). Corporate directors and officers assume a fiduciary role in relation to the corporate entity and the shareholders. *Tornick v. Dinex Furniture Industries, Inc.*, 148 A.D.2d 602, 603 (2d Dept. 1989). Moreover, as to Limited Liability Companies, LLC Law § 409(a) provides that, "A manager shall perform his or her duties as a manager...in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." *See Out of the Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 578 (2d Dept. 2008) (manager of limited liability company owed fiduciary duty to plaintiff members), citing, *inter alia*, LLCL § 409(a). *See also Salm v. Feldstein*, 20 A.D.3d 469, 470 (2d Dept. 2005) (defendant, as managing member of limited liability company, owed co-member plaintiff fiduciary duty to make full disclosure of all material facts); *Pokoik v. Pokoik*, 115 A.D.3d 428 (1st Dept. 2014) (as managing member of

LLCs, defendant owed plaintiff, a nonmanaging member, a fiduciary duty).

Here, Gallina's limited involvement in the operation of Millienium does not give rise to a fiduciary duty to that entity. Gallina's status as a member of the "Board of Directors" of Millenium does not give rise to any special duty because, in reality, he had no managerial or oversight responsibilities at that entity. Indeed, it unclear what, if any, status Gallina enjoyed as a "member" of the "Board of Directors." While Gallina could have such a duty as a member or appointed manager of that entity, which is an LLC organized under Delaware law, he was neither a member or appointed manager here. Thus, he does not have a special fiduciary duty to that entity.

Neither do Defendants, as employees of McKinnon Doxsee, owe any fiduciary duty to that entity beyond the obligation not to make improper use of the employer's "time, facilities or proprietary secrets." *FPS Productions, Inc. v. Livolsi*, 68 A.D.3d 1101 (2d Dept. 2009). There are no facts in the record that either defendant used either plaintiff's "time" or "facilities" as part of their new employment. Moreover, the customer information in the Gallina-Marklin book is not a "proprietary secret," as the courts throughout this state have recognized. *See Levine v. Bochner*, 132 A.D.2d 532 (2d Dept. 1987); *Brewster-Allen-Wichert, Inc. v. Kiepler*, 131 A.D.2d 620 (2d Dept. 1987); *see also Arnold K. Avis. & Co., Inc. v. Ludemann*, 160 A.D.2d 614 (1st Dept. 1990); *Cool Insuring Agency, Inc. v. Rogers*, 125 A.D.2d 758 (3d Dept. 1986); *Reidman Agency, Inc. v. Musnicki*, 79 A.D.2d 1094 (4th Dept. 1981). Rather, the information consists essentially of names and contact information that were readily available to all parties,

Finally, neither defendant had a non-compete agreement or other restriction on employment upon leaving McKinnon Doxsee. Put simply, the Court concludes that Defendants'

actions in ceasing employment at McKinnon Doxsee and using information gleaned from that employment that is both not a trade secret and remained available to McKinnon-Doxsee does not establish a breach of any duty that would otherwise exist.

Aiding and Abetting Breach of Fiduciary Duty / Accounting

A cause of action for aiding and abetting a breach of fiduciary duty requires a showing of a fiduciary duty owed to plaintiff by another, a breach of that duty, defendant's substantial assistance in effecting the breach, together with resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept. 2008). Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that the defendant had actual knowledge of the breach of duty. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability. *Id.* The right to an accounting is premised on the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking an accounting has an interest. *Dee v. Rakower*, 112 A.D.3d 204, 214 (2d Dept. 2013), citing *Lawrence v. Kennedy*, 95 A.D.3d 955, 958 (2d Dept. 2012), quoting *Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (1st Dept. 1986).

Here, the Court has concluded that Plaintiffs have not proven their breach of fiduciary duty claim. *A fortiori*, the claim for aiding and abetting breach of fiduciary duty and the claim for an accounting must fail as well.

Unfair Competition

The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's

business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship. *Dayton Superior Corp. v. Marjam Supply Co., Inc.*, 2011 U.S. Dist. LEXIS 17221, * 46 (E.D.N.Y. 2011), quoting T*elecom International v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001). A claim for unfair competition has been broadly described as encompassing any form of commercial immorality, or simply as endeavoring to reap where one has not sown; it is taking the skill, expenditures and labors of a competitor, and misappropriating for the commercial advantage of one person, a benefit or property right belonging to another. *Dayton Superior Corp. v. Marjam Supply Co., Inc.*, 2011 U.S. Dist. LEXIS 17221 at * 47, quoting *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir. 1982) (internal citations, alterations and quotation marks omitted).

The New York Court of Appeals has set forth two long-recognized theories of common-law unfair competition: 1) "palming off", which refers to the sale of the goods of one manufacturer as those of another, and 2) "misappropriation," which encompasses the principle that one may not misappropriate the results of the skill, expenditures and labors of a competitor. *Dayton Superior Corp.*, 2011 U.S. Dist. LEXIS 17221 at * 47-48, citing *ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 476-77 (2007), quoting *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 567-68 (1959).

In the absence of a restrictive covenant, an employee may freely compete with a former employer unless trade secrets are involved or fraudulent methods are employed. *Pearlgreen Corp. v. Chu*, 8 A.D.3d 460, 461 (2d Dept. 2004), quoting *Walter Karl, Inc. v. Wood,* 137 A.D.2d 22, 27 (2d Dept. 1988). 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 gain an

advantage over competitors who do not know or use it. *Ashland Mgt. v. Janian*, 82 N.Y.2d 395, 407 (1993), citing Restatement of Torts Section 757, comment b. In deciding a trade secret claim, the court should consider the following factors: 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, and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Ashland Mgt. v. Janian*, 82 N.Y.2d at 407.

Here, there were no restrictive covenants preventing Defendants from using the information at issue. Moreover, as discussed above, the information at issue was not proprietary and was not a trade secret. In addition, the Plaintiffs had as many as ten days after defendants contacted customers to attempt to convince those customers to remain with Plaintiffs. Thus, Plaintiffs have not proven their unfair competition claim.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Submit judgment on ten (10) days notice.

ENTER

DATED: Mineola, NY
December 14, 2016

ENTERED
DEC 23 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. TIMOTHY S. DRISCOLL
J.S.C.