A Great Choice Lawncare & Landscaping, LLC v Carlini
2017 NY Slip Op 33224(U)
July 19, 2017
Supreme Court, Broome County
Docket Number: EFCA2016002955
Judge: Molly Reynolds Fitzgerald

At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, Binghamton, New York on the 31st day of March, 2017.

PRESENT: HON. MOLLY REYNOLDS FITZGERALD
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

A GREAT CHOICE LAWNCARE AND LANDSCAPING, LLC,

Plaintiff,

vs.

DECISION AND ORDER

MICHAEL CARLINI and LAWNSENSE LAWN & LANDSCAPE,

Index No.: EFCA2016002955
RJI No.: 2017-0066-M

Defendants.

On June 2, 2009, Defendant Michael Carlini (hereinafter referred to as Carlini) entered into an "Employment Agreement" with his then employer A Great Choice Lawncare and Landscaping, LLC. The contract was duly signed by both Carlini and John Sacco, as a member of Plaintiff LLC. The Employment Agreement contained both a confidentiality covenant and a non-competition covenant. On October 28, 2016, Carlini was terminated by Mr. Sacco. Almost immediately, he began working for Defendant, Lawnsense Lawn & Landscape. Shortly thereafter, plaintiff filed the case at bar seeking damages for breach of contract, unjust enrichment, misappropriation of trade secrets, fraud, conversion, and tortious interference with contract. Carlini moved to dismiss plaintiff's breach of contract,

misappropriation of trade secrets and fraud causes of action. Thereafter, plaintiff filed an amended complaint. The amended complaint contains eight causes of action; it deletes plaintiff's cause of action for fraud and adds actions alleging unfair competition against both defendants and breach of fiduciary duty.

In short order, plaintiff filed an order to show cause seeking a preliminary injunction against defendants enforcing the 2009 Employment Agreement's non-competition and confidentiality covenants. Carlini opposed the injunctive relief and moved to dismiss counts 1, 4 and 5 of the amended complaint. Likewise, defendant Lawnsense moved to dismiss the complaint.

The court denied the application for preliminary injunctive relief and now considers the motions to dismiss.

In considering a motion to dismiss, the pleadings are to be afforded liberal construction, the allegations contained within the complaint are to be assumed true, and the plaintiff must be given every favorable inference, *Leon v Martinez*, 84 NY2d 83 (1994). Here, defendants have moved pursuant to CPLR 3211(a)(1) and (7), a defense founded on documentary evidence, and failure to state a cause of action, respectively. A motion to dismiss based on documentary evidence under CPLR 3211(a)(1) will be granted if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law, and definitively disposes of plaintiff's claim, *Ganje v Yusuf,* 133 AD3d 954, 956 (2015). When dismissal is sought for failure to state a cause of action the criterion is whether the proponent has a cause of action, not whether he has stated one, *Chenango Contracting v Hughes*, 128 AD3d 1150, 1151 (2015).

CPLR 3211(a)(1)

Here, the documentary evidence on which the defendants base their motions, is the

2009 Employment Agreement, the only employment agreement ever entered into by the parties. Under "Term of Employment" the contract reads as follows:

> "Employee's employment with the Company shall commence on or before the 30th day of April, 2009, and shall continue for a period of twelve (12) months ("Initial Term"), unless this Employment Agreement is terminated pursuant to the provisions in Sections eight (8), nine (9), or ten (10) of this Agreement. If neither party elects to terminate this Employment Agreement, in writing, and on or before the end of the Initial Term, this Agreement shall automatically renew for an additional one (1) year ("Renewal Term")."

Defendants argue that under the clear and unambiguous language of the Agreement, the last date of its viability (provided neither party terminated it in writing - and neither did) was April 29, 2011. Conversely, plaintiff urges the court to apply the common-law rule which provides that parties intend to renew an employment agreement for an additional year where the party continues to work after the expiration of an employment contract. Both parties cite *Goldman v White Plains Ctr. for Nursing Care*, LLC, 11 NY3d 173 (2008) as binding precedent for their position.

In *Goldman*, the court reiterated the well established rule of contract construction which provides agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract, according to the plain meaning of its terms, *Goldman* at 176. Here, the plain language of the contract states that the "initial term" of the contract runs from April 30 for a period of 12 months, and in the event employment is not terminated by either party during that 12 month period, the agreement will "automatically renew" for an additional one year period. Certainly under the plain meaning of the language this Agreement has a maximum term of two years. Plaintiff's first argument - that all provisions automatically renew, i.e. the "Initial Term" and then an additional one year ad infinitum, is a clever piece of sophistry,

but both fails the plain meaning test and inflates the common law rule to a two year renewal."[1]

However, his second argument, that New York recognizes the common law presumption of renewal, bears closer inspection.

Contrary to the defendants' assertion, the Court in *Goldman* did not "foreclose" the common-law presumption of renewal. Rather, it limited its application by holding, "the common-law rule cannot be used to imply that there was mutual and silent assent to automatic contract renewal *when an agreement imposes an express obligation on the parties to enter into a new contract to extend the term of employment.*" Here, the Agreement contains no such obligation.

However, while the contract in question here does not contain an obligation to negotiate, neither is it the yearly contract that gives rise to the presumption. In its decision in *Curren v Carbonic Sys., Inc.*, 58 AD3d 1104, 1108 (2009), cited by plaintiff, the court writes, "where an individual enters into an employment contract for one year at an annual salary and continues in that employment after the year ends, an inference arises that the parties intended the contract to renew for another year." In the case before the court, the inference does not arise because there is no room for an "inference" to be made. Instead, the plain language of the contract very clearly defines the initial term, and then limits renewal to "an additional one (1) year ("Renewal Term")."

A court is duty-bound to adjudicate the parties' rights according to unambiguous provisions and give words and phrases employed their plain meaning, *Angelino v Michael Freedus, D.D.S., P.C.*, 69 AD3d 1203, 1206 (2010). Thus, the court finds that the 2009

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[1] Why denominate the first twelve months as "Initial Term"? Is it still the "Initial Term" five years down the road?

Employment Agreement has expired and its terms are no longer binding on either party. Carlini's motion to dismiss count 1 of the amended complaint is granted, as is plaintiff's eighth cause of action against Lawnsense.

CPLR 3211(a)(7)

The fourth cause of action is for misappropriation of trade secrets. The fifth cause of action is for unfair competition. At this time, these actions cannot be dismissed. A customer list is not entitled to judicial protection if the information on it is readily ascertainable. There has been some testimony that the information taken contained valuable confidential information. An employee's illegal physical taking or copying of an employer's files or confidential information constitutes actionable unfair competition, *Advanced Magnification Instruments of Oneonta v Minuteman Opt. Corp.*, 135 AD2d 889, 891 (1987). Likewise it constitutes actionable misappropriation of trade secrets. Whether or not the actions in this case are found to constitute viable actions certainly cannot be determined via a pre-answer motion to dismiss.

Based upon the above analysis, the remainder of defendant Carlini's motion is denied. Lawnsense's motion to dismiss the plaintiff's complaint is granted only to the extent that the cause of action based on tortious interference with contract is dismissed. Carlini's request for sanctions is emphatically denied.

This constitutes the Decision and Order of this court.

Dated: July 19, 2017

HON. MOLLY REYNOLDS FITZGERALD
SUPREME COURT JUSTICE

cc: Robert C. Whitaker, Esq.
Ronald L. Greene, Esq.
F. Paul Battisti, Esq.
Judith E. Osburn, Broome County Chief Court Clerk