

**EXR Group Cos. LLC v Olmsted Real Estate LLC**

2018 NY Slip Op 33176(U)

December 3, 2018

Supreme Court, Kings County

Docket Number: 514657/18

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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EXR GROUP COMPANIES LLC,

Plaintiff,

Decision and order

- against -

Index No. 514657/18

OLMSTED REAL ESTATE LLC, HARRISON BALISKY,  
KEAT CHOW & AARON LEE a/k/a KUN HO LEE,

Defendants,

December 3, 2018

*ns # 282*

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking an injunction preventing the defendants from utilizing the plaintiff's proprietary information in their business. The defendants have cross-moved pursuant to CPLR §3211 seeking to dismiss the complaint. The motions have been opposed respectively. Papers were submitted by both parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

The defendants Balisky, Chow and Lee were all employed at the plaintiff's real estate brokerage firm. The defendants all left EXR and opened a competing firm the defendant Olmsted Real Estate LLC. A complaint was filed wherein the plaintiff alleges the defendants obtained the plaintiff's confidential and proprietary information including trade secrets, client lists and contact information, discount structures and commission pricing. The complaint asserts the defendants misappropriated the confidential information of EXR and indeed the complaint alleges causes of action for the interference with business relations, unjust enrichment and similar claims.

The plaintiff has now moved seeking an injunction preventing the defendants from utilizing any of EXR's information. The defendants have moved seeking to dismiss the complaint on the grounds it has no merit.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that in order to state an actionable claim for tortious interference with business relations, a plaintiff must allege: (1) the existence of a business relation with a party; (2) that the defendant, having knowledge of such relationship, intentionally interfered with it; (3) that the

defendant either acted with the sole purpose of harming the plaintiff or by means that were dishonest, unfair, or improper, and (4) a resulting injury to the plaintiff's business relationship (Island Rehabilitative Services Corp. v. Maimonides Med. Ctr., 19 Misc3d 1108A, 859 NYS2d 903 [Supreme Court New York County 2008]). The basis of this cause of action and indeed all the causes of action contained in the complaint is that the defendants essentially stole secrets and proprietary information from EXR and they have intentionally caused breaches of contracts between EXR and third parties. While of course the plaintiff will be required to prove those allegations, at this stage of the litigation, accepting the allegations as true, the motion seeking to dismiss is hereby denied.

Turning to the motion seeking an injunction, it is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]).

In this case the basis for the injunction is grounded in the fact it is alleged the failure to grant such relief will cause harm to the plaintiff. Specifically, EXR alleges the defendants have essentially stolen clients from them and hence they are

seeking an injunction to stop this activity. The defendants deny these underlying facts supporting the injunctive relief and indeed there is scant evidence presented supporting those allegations. Indeed, other than conclusory allegations of improper conduct, the only evidence consists of the plaintiff's claims. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1<sup>st</sup> Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the basis for the injunction rests upon "speculation and conjecture" the injunction must be denied (Faberge International Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1<sup>st</sup> Dept., 1985]). Thus, EXR asserts the information utilized by the defendants was "confidential and proprietary information and trade secrets through their employment relationship, including client lists and contacts, commission pricing structures, and commission split structures" (see, Affidavit of Brendan Thrapp, ¶9). However, Harrison Balisky submitted an affidavit wherein it states that "as to the customers and transactions specifically identified by the Plaintiff in its motion papers and Complaint, they were either brought to the Plaintiff's firm by us, a product of our individual and unassisted (by the Plaintiff) recruitment



efforts, or are well known to the Plaintiff's competitors" (id at ¶29). Since these allegations are wholly disputed an injunction is improper.

Therefore, the motion seeking a preliminary injunction is denied.

So ordered.

ENTER:

DATED: December 3, 2018  
Brooklyn NY

  
  
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Hon. Leon Ruchelsman  
JSC

KINGS COUNTY CLERK  
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