Bax v Interenergy Holdings
2021 NY Slip Op 32458(U)
November 26, 2021
Supreme Court, New York County
Docket Number: Index No. 650499/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MICHAEL BAX Plaintiff, - v - INTERENERGY HOLDINGS, Defendant.	**INDEX NO.** 650499/2018 **MOTION DATE** 01/11/2021, 01/11/2021 **MOTION SEQ. NO.** 005 006 **DECISION + ORDER ON MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 277

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 269, 270, 271, 272, 273, 274, 275, 276

were read on this motion for SUMMARY JUDGMENT.

Plaintiff Michael Bax ("Bax") was a long-time employee of Defendant InterEnergy Holdings ("InterEnergy"). In September 2017, Bax resigned his position as Director of New Business, and accepted a job as CEO of Thermion Energy Service Company ("Thermion"), which he described as "a new startup in the Mexican Energy sector." InterEnergy thereafter cancelled Bax's stock options on the ground that Bax violated the non-compete, non-solicitation, and non-disclosure covenants in the company's Stock Option Plan.

Bax alleges in his Complaint that InterEnergy's cancellation of his options constituted a breach of contract. InterEnergy has counterclaimed for breach of fiduciary duty, misappropriation of trade secrets, and unfair competition.

InterEnergy moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint and granting its counterclaim seeking disgorgement of Bax's salary during the period of his alleged disloyalty to InterEnergy. Bax opposes InterEnergy's motion and moves for summary judgment dismissing InterEnergy's counterclaims.

For the reasons that follow, both motions are denied.

BACKGROUND

InterEnergy is a limited liability company organized under the laws of the Cayman Islands (*see* Complaint, NYSCEF Doc. No. 2). It owns and operates power generation and distribution assets, and fuel distribution and logistics businesses in Latin America and the Caribbean (*id.*). Bax worked for InterEnergy and its predecessor companies for over 18 years (*id.*).

In 2015, InterEnergy provided Bax with a Stock Option Plan, which states, in part:

> "The Plan shall be administered by the [Compensation Committee of the Board or any other committee of the Board of InterEnergy]. The Committee shall have full and final authority to take the following actions, in each case, subject to the provision of the Plan:
> …
> (iii) to determine the terms and conditions of Options granted under the Plan, including, without limitation the exercise price, conditions relating to exercise, and termination of the right to exercise"

(Stock Option Plan, NYSCEF Doc. No. 3, §4[a]).

Section 6 of the Stock Option Plan, entitled Option Termination, states, in part:

> "Unless otherwise determined by the Committee and set forth in a Grant letter, each Option shall terminate upon the earliest of:
> …
> (b) the Grantee's having first engaged in Specified Conduct, whether before or after termination of employment, provided that this Section 6(b) shall not apply if the Grantee first engages in such Specified Conduct following the termination of his employment by the Company other than for Cause"

(*id.*).

The term "Specified Conduct," which gives rise to potential termination of the Option, is defined in §2(t) to mean:

> "(i) a breach of any post-employment restrictive covenants contained in any agreement between the Grantee and the Company or any of its Affiliates, (ii) the Grantee's **unauthorized disclosure of confidential information** relating to the Company or its Affiliates, (iii) at any time during the six-month period following the Grantee's termination of employment, the Grantee's engaging, directly or indirectly, as an employee, partner, consultant, director, stockholder, owner, or agent in **any business that is competitive with the business conducted by the Company** and its Affiliates at the time of the Grantee's termination of employment, (iv) at any time during the six-month period following the Grantee's termination of employment, the Grantee's soliciting or inducing, directly or indirectly, any former, present or prospective customer or client of the Company or its Affiliates to purchase any services or products offered by the Company or its Affiliates from any Person other than the Company or its Affiliates, or (v) at any time during the six-month period following the Grantee's termination of employment, the Grantee's **hiring, directly or indirectly, any individual who was an employee of the Company** or its Affiliates within the six (6) month period prior to the Grantee's termination of employment, or the Grantee's **soliciting or inducing**, directly or indirectly, any such individual to terminate his or her employment with the Company or its Affiliates"

(*id.* [emphases added]).

The Amended and Restated Option Grant Certificate states, in part:

"1. Name of Grantee: Michael Bax
2. Number of Shares subject to the Option: 300
3. Exercise price per Share: $52,000
4. Date of Grant Date of this Option: June 3, 2015
5. Vesting Measurement Date: January 1, 2012
6. Performance Period: January 1, 2015 through December 31, 2018
7. Performance Goal: Average annual EBITDA Per Share for the Performance Period must equal or exceed $9,257.63.
8. Vesting Schedule:
Subject to Section 6 of the Plan, this Option shall vest as to:
   - 112.5 Shares as of the date of the grant of this Option;
   - 67.5 Shares subject to achievement of the Performance Goal;
   - 22.5 hares on each of January 1, 2016, January 1, 2017, January 1, 2018, and January 1, 2019; and
   - all of the Shares upon a Liquidity Event
9. Termination of the Option: The Option shall terminate in accordance with the provisions of Section 6 of the Plan
10. Special Liquidity Right: Subject to the terms and conditions of this Section 10, during the Put Period (as described below) with respect to each year beginning with the 2020 calendar year, the Grantee shall have the right, but not the obligation, to sell to the Company the portion of the Option which is vested as of the date of sale (such right, the 'Put Right')"

(Amended and Restated Option Grant Certificate, NYSCEF Doc. No. 5). The term "Liquidity Event" is defined in the Stock Option Plan to mean "either a Sale of the Company or a Listing" (Stock Option Plan, *supra*).

Bax resigned as Director of New Business at InterEnergy on September 2, 2017 (*see* Email, NYSCEF Doc. No.103). On September 4, 2017, he began his employment as CEO of Thermion (*id.*). On October 13, 2017, counsel for InterEnergy notified Bax that the Stock

Option Plan terminated automatically upon the occurrence of a Specified Event (*see* Email, NYSCEF Doc. No. 99). This action ensued.

Bax claims that InterEnergy wrongfully terminated his rights under the Stock Option Plan. The Complaint alleges causes of action for breach of contract (count I); unjust enrichment (count II); and injunctive relief (count III) (Complaint, NYSCEF Doc. No. 2). Bax abandoned the cause of action for unjust enrichment at oral argument (*see* Transcript, NYSCEF Doc. No. 277, p.6) and stipulated to dismiss the cause of action for injunctive relief, and to waive his right to pursue reinstatement of return of the stock options under the Stock Option Plan (*see* Stipulation, NYSCEF Doc. No. 84). Accordingly, Bax's sole remaining claim is for compensatory damages arising out of InterEnergy's alleged breach of contract.

InterEnergy's Answer includes general denials of the allegations in the Complaint and multiple affirmative defenses (*see* Answer, NYSCEF Doc. No. 11). By order entered November 9, 2019, this Court (Scarpulla, J.) granted InterEnergy's motion for leave to amend its Answer to assert counterclaims (Order, NYSCEF Doc. No. 44). InterEnergy's counterclaims allege breach of fiduciary duty/duty of loyalty as a faithless servant (first counterclaim); misappropriation of trade secrets under the Defend Trade Secrets Act, 18 USC 1836, and New York common law (second counterclaim); and unfair competition (third counterclaim) (Amended Answer, NYSCEF Doc. No. 251). InterEnergy claims, in essence, that Bax violated a non-compete (§2[t][iii]), non-solicitation (§2[t][v]) and non-disclosure (§2[t][iv]) restrictive covenants contained in the Stock Option Plan by resigning for InterEnergy and going to work for Thermion, a competitor; inducing two former InterEnergy employees to terminate their employment and hiring them to work for Thermion; and disclosing InterEnergy's confidential information to Thermion, for whom he secretly worked prior to his resignation from InterEnergy.

The Pending Motions

In seeking summary judgment, InterEnergy argues that it properly terminated the Stock Option Plan since Bax engaged in certain Specified Conduct that violated the non-compete, non-solicitation, and non-disclosure restrictive covenants of the plan after he voluntarily resigned from InterEnergy to become the CEO of Thermion.

InterEnergy asserts that it and Thermion both compete for renewable energy assets and development projects assets in Mexico. InterEnergy also asserts that Bax's introduction to Thermion predated his resignation from InterEnergy; that Bax was first introduced to Thermion through his employment with InterEnergy; that he used InterEnergy business to sustain his interactions with Thermion; that he manipulated his introduction to Thermion to pursue employment for himself; and that he secured an offer to be CEO after a nine-month courtship of Thermion.

InterEnergy also asserts that Bax solicited InterEnergy employees, Luzoraida "Lucy" Peralta ("Peralta"), a civil engineer, and Alvaro Sanz ("Sanz"), a mechanical engineer, causing them to terminate their employment as part of InterEnergy's New Business Team and join Thermion, though they were not actually hired until after the 6-month period specified in the Option Plan. In addition, InterEnergy asserts that Bax divulged to Thermion confidential information regarding InterEnergy's ongoing investment projects, including Project Maya, an energy deal in Mexico that InterEnergy pursued in 2017. InterEnergy also asserts that Bax stole its document containing data regarding stock options.

To support its position, InterEnergy relies on, among other things, its Shareholder Agreement, which defines its "Primary Business" as "the generation, transmission and distribution of electricity and/or importation, commercial storage and commercial distribution of

liquefied natural gas (LNG), natural gas and other liquid fuels in the Region" of Latin America and the Caribbean (Fourth Amended and Restated Shareholder Agreement, NYSCEF Doc. No. 95). InterEnergy also submits excerpts from the deposition transcripts of Bax (Transcript, NYSCEF Doc. No. 98); Rolando Gonzalez-Bunster (Gonzalez-Bunster), CEO of InterEnergy and Chairman of the Board of Directors (NYSCEF Doc. No. 145, p. 108); and Flavio da Silveira Pinheiro (Pinheiro), Managing Director, Head of Corporate Finance, and a member of InterEnergy's Board of Directors (NYSCEF Doc. No. 94), essentially stating that InterEnergy competes with Thermion. In addition, InterEnergy submits an Expert Report from Joseph Omoworare, stating, in part, that "InterEnergy has historical and prospective business activity in Latin America, including Mexico" (Export Report, NYSCEF Doc. No. 149, p. 5).

InterEnergy also offers excerpts from Bax's deposition testimony that after his resignation, he regularly communicated with Peralta and Sanz about the allegedly "poor quality of work environment" at InterEnergy and "the pleasure" he was enjoying at Thermion (Bax deposition, NYSCEF Doc. No. 73, pp. 216-220). Bax also testified that he extended offers of employment to Peralto and Sanz and negotiated the terms of their employment with Thermion (*id.*).

InterEnergy further submits a series of email exchanges between Bax and Rene Maingot of Thermion, including (1) an email dated April 2017, stating "[w]orth a look" with a "Confidential Information Memorandum" regarding "Project Maya," an investment deal that InterEnergy pursued in 2017, attached to it (Email, NYSCEF Doc. 112; Confidential Information Memorandum, NYSCEF Doc. No. 131); (2) an email regarding InterEnergy's investments with Fomento Económico Mexicana, S.A.B. in Panama ("Femsa") (see Email, NYSCEF Doc. No.

110); and emails regarding InterEnergy's staffing needs, reporting structure, and business growth plan (*see* Emails, NYSCEF Doc. Nos. 109-113).

In opposition, Bax insists that InterEnergy and Thermion are not competitors since InterEnergy does not have any business in Mexico, and the majority of its business is non-renewable energy, including gas and fuel oil (*see* Bax Affid, NYSCEF Doc. No. 226). Bax acknowledges that he spoke to Rene Maingot of Thermion in October 2015; that he signed a non-disclosure agreement with Thermion, prior to his departure from InterEnergy, as part of his investigation of an employment opportunity; and that he offered Thermion is opinion on various topics (*id.*). However, he asserts that he did not receive any compensation from Thermion while he was employed by InterEnergy (*id.*). He also asserts that he merely mentioned to Rene Maingot that he planned to meet with Femsa, and he denies discussing the details of InterEnergy's power purchase agreement with Femsa with anyone outside InterEnergy (*id.*). He further asserts that he met with Thermion on his personal time and at his own expense (*id.*). In addition, he asserts that Project Maya sold 100% of its energy to Guatemala, and none to Mexico (*id.*).

Bax also denies asking Sanz and Peralta to join Thermion (*id.*). He asserts that InterEnergy did not obtain any documents or testimony from Sanz and Peralta; that Sanz was not an employee of InterEnergy; and that the hiring of Sanz and Peralta by Thermion could not have violated the Stock Option Plan since Sanz and Peralta went to work for Thermion after InterEnergy terminated the Stock Option Plan.

Bax also insists that he did not discuss Project Maya with Rene Maingot at Thermion or sabotage InterEnergy's bid on Project Maya (*id.*). Rather, he asserts that he sent a teaser about Project Maya to Rene Maingot with the intention of pointing out energy prices in the Mexican

energy market as part of a general discussion about employment (*id.*). He also asserts that he did not steal any stock option documents from InterEnergy. He states that he received certain documents from InterEnergy in his personal email and shared them with his counsel for purposes of settlement negotiations in this action (*id.*).

To support his position, Bax relies, in part, on excerpts from Pinheiro's deposition testimony that InterEnergy does not have any offices in Mexico (Pinheiro deposition, NYSCEF Doc. No. 227, p. 136). In addition, Bax relies on the deposition testimony of Gonzalez-Bunster that he did not know if InterEnergy has a confidentiality policy (*see* Gonzalez-Bunster deposition, NYSCEF Doc. No. 196, p. 39), and that teasers are not bound by any confidentiality (*see* Gonzalez-Bunster deposition, NYSCEF Doc. No. 223, p. 54).

DISCUSSION

The proponent of a motion for summary judgment 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 (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see JMD Holding Corp. v Congress Fin. Corp.*, 43 NY3d 373, 384 [2005]). However, once the 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 (*see Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the remaining count in the Complaint alleges a cause of action for breach of contract. To establish breach of contract, a plaintiff must show the existence of a valid and enforceable agreement, adequate performance by the plaintiff, and breach by the defendant, resulting in damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept. 1986]). Bax alleges that and he and InterEnergy entered into an agreement governed by the Stock Option Plan and the Option Grant Certificate; that the stock options vested under a schedule included in the agreement; and that InterEnergy breached the agreement by wrongfully terminating his stock options, resulting in damages (Complaint, *supra*).

On review of the parties' submissions, the Court concludes that InterEnergy's motion for summary judgment dismissing the Complaint must be denied. Although InterEnergy pursued one project in Mexico (unsuccessfully), InterEnergy has not established conclusively that Thermion is a "business that is competitive with the business conducted by the Company," as required for establishing a breach of the non-compete provision in the Stock Option Plan. Moreover, there is a dispute as to whether regulatory limitations on Thermion's business activities further undermine any argument that it is an InterEnergy competitor. There is also a factual dispute as to whether Bax solicited or induced employees to leave Thermion and whether the Project Maya "teaser" constituted "unauthorized disclosure of confidential information relating to the Company or its Affiliates."

Similarly, the branch of the parties' respective motions seeking summary judgment on InterEnergy's counterclaim for breach of fiduciary duty and duty of loyalty as a faithless servant must also be denied. An employee breaches a duty of loyalty by "act[ing] directly against the employer's interest—as in embezzlement, improperly competing with the current employer, or usurping business opportunities" (*Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529, 530

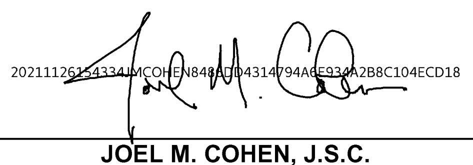
[1st Dept 2011]). The existence of questions of fact regarding whether Bax improperly misused confidential information and competed with InterEnergy preclude summary judgment on this counterclaim.

Bax's motion for summary judgment dismissing the remaining counterclaims, for unfair competition with defendant and misappropriation of confidential/proprietary business information belonging to InterEnergy, is also denied. New York courts have long recognized two theories of common-law unfair competition: "palming off" and "misappropriation" *(see ITC Ltd. v Punchgini,Inc.*, 9 NY3d 467, 476 [2007]). InterEngergy bases its counterclaim on the second theory, misappropriation, which typically concerns "the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property" (*id*. at 478). As stated, the submissions raise triable issues of fact as to whether Bax unfairly competed with InterEnergy. Likewise, triable issues of fact exist as to whether Bax used InterEnergy's confidential documents in breach of an agreement, confidential relationship, or duty (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015]).

Accordingly, it is

ORDERED that the parties' respective motions for summary judgment (Motion Sequence Numbers 005 and 006) are **denied**.

This constitutes the decision and order of the Court.



11/26/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION			
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART		☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER			
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	